EDITOR'S NOTE

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D. 84-1044-ASX
tatus: GRANTED

Title: Pacific Gas and Electric Company, Appellant
v.
Public Utilities Commission of California, et al.

ocketed:
ecember 31, 1984

Court: Supreme Court of California

Counsel for appellant: Furbush,Malcolm H., Harris,Robert L.

Counsel for appellee: Kerr,Janice E., Mayer,Steven L., Woocher,Frederic D., Falk Jr.,Jerome B., Knecht,William L., Fogelman,Mark

ntry	Date	Note	Proceedings and Orders
1	Dec 31 1984	G	Statement as to jurisdiction filed.
2	Dec 31 1984		Appendix of appellant Pacific Gas & Elec. Co. filed.
4	Jan 14 1985		Order extending time to file response to jurisdictional statement until February 14, 1985.
5	Jan 22 1985		Order extending time to file response to jurisdictional statement until March 1, 1985.
7	Jan 26 1985		Brief amicus curiae of CA Chamber of Commerce filed.
8	Jan 29 1985		Brief amicus curiae of Consolidated Edison Co. filed.
9	Feb 11 1985		Brief amicus curiae of Pacific Northwest Bell, et al. filed.
10	Feb 11 1985		Brief amicus curiae of American Gas Assn. filed.
11	Feb 14 1985		Lodging received from Robert Baum.
12	Feb 14 1985		Brief amicus curiae of Edison Electric Institute filed.
13	Feb 19 1985		Brief amicus curiae of Sierra Pacific Power Co. filed.
14	Feb 23 1985		Brief amicus curiae of Pacific Bell, et al. filed.
15	Mar 1 1985		Brief amicus curiae of San Diego Gas & Electric Co. filed.
16	Mar 4 1985		Motion of appellees PUC of CA, et al. to dismiss filed.
17	Mar 4 1985		Motion of appellees Consumers Union, et al. to dismiss filed.
18	Mar 6 1985		DISTRIBUTED. March 22, 1985
19	Mar 20 1985	X	Reply brief of appellant Pacific Gas & Elec. Co. filed.
20	Mar 25 1985		PROBABLE JURISDICTION NOTED. Justice Blackmun and Justice Powell DLT.
			**********
22	Apr 4 1985		Order extending time to file brief of appellart on the merits until May 30, 1985.
24	Apr 4 1985		Order extending time to file brief of appellee on the merits until July 20, 1985.
25	May 6 1985		Brief amicus curiae of Pacific Legal Foundation and Consumer Alert filed.
26	May 15 1985	G	Motion of the parties to dispense with printing the joint appendix filed.
27	May 28 1985		Motion of the parties to dispense with printing the joint appendix GRANTED.
28	May 28 1985		Brief amicus curiae of Pacific Northwest Telephone Co., et al. filed.
29	May 29 1985		Brief amicus curiae of Bell Atlantic Telephone Companies filed.
30	May 30 1985		Brief amicus curiae of California Chamber of Commerce filed.
31	May 30 1985		Brief amicus curiae of Pacific Bell, et al. filed.
32	May 30 1985		Brief amicus curiae of Sierra Pacific Power Co. filed.
33	May 30 1985		Brief amicus curiae of Washington Legal Foundation filed.

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ntry	Date	Note	Proceedings and Orders
34	May 29 1985		Brief amicus curiae of American Gas Association filed.
35	May 30 1985		Brief amicus curiae of Edison Electric Institute filed.
36	May 30 1985		Brief amicus curiae of Mountain States Legal Foundation filed.
37	May 30 1985		Brief amicus curiae of Gas Distributors Information Service filed.
38	May 30 1985		Brief amicus curiae of National Fuel Gas Distribution Corp., et al. filed.
39	May 30 1985		Brief amicus curiae of Consolidated Edison Co. filed.
40	May 30 1985		Brief amicus curiae of Mid-America Legal Foundation filed.
41	May 30 1985		Brief of appellant Pacific Gas & Electric Company filed.
42	Jun 10 1985	D	Motion of appellees Toward Utility Rate Normalization, et al. for divided argument filed.
43	May 30 1985		Brief amicus curiae of Wisconsin State Telephone Association, et al. filed.
44	May 30 1985		Lodging received with amici brief.
45	Jun 7 1985		Opposition of appellee Public Utilities Commission of California to motion of appellees Toward Utility Rate Normalization, et al. for divided argument filed.
46	Jun 17 1985		Motion of appellees Toward Utility Rate Normalization, et al. for divided argument DENIED. Justice Blackmun and Justice Powell DLT.
47	Jul 5 1985		Application by Toward Utility Rate Normalization, California Public Interest Research Group, Consumers Union, Consumer Federation of California, and Common Cause of California for leave to file brief on the
48	Jul 5 1985		merits in excess of page limitations, and order denying
49	Jul 5 1985		same by Rehnquist, J., on July 9, 1985. (A-9).
50	Jul 10 1985		Record filed.
51	Jul 18 1985		SET FOR ARGUMENT, Tuesday, October 8, 1985. (4th case)
52	Jul 22 1985		Brief amicus curiae of AFL-CIO filed.
53	Jul 20 1985		Brief amicus curiae of Illinois, et al. filed.
54	Jul 19 1985		Brief amicus curiae of Telecommunications Research and Action Center, et al. filed.
55	Jul 20 1985		Brief amicus curiae of California, et al. filed.
56	Jul 19 1985		Brief amicus curiae of NY Citizens' Utility Board, Inc., et al. filed.
57	Jul 19 1985		Brief amicus curiae of Natl. Assn. of State Utility Consumer Advocates, et al. filed.
58	Jul 20 1985		Brief amicus curiae of Wisconsin filed.
59	Jul 20 1985		Brief amicus curiae of National League of Cities, et al. filed.
60	Jul 20 1985		Brief amicus curiae of Center for Public Interest Law, USD School of Law filed.
61	Jul 20 1985		Brief amicus curiae of Legal Aid Society of NY City filed.
62	Jul 20 1985		Brief amicus curiae of Public Service Commission of NY, et al. filed.
63	Jul 18 1985		Brief amicus curiae of Wisconsin Citizens' Utility Board filed.
64	Jul 20 1985		Brief amicus curiae of Oregon filed.
65	Jul 20 1985		Brief of appellees PUC of CA, et al. filed.

ntry	Date	Note	Proceedings and Orders
66	Jul 20 1985		Brief of appellees Toward Utility Rate Normalization, et al. filed.
67	Aug 7 1985		CIRCULATED.
68	Sep 20 1985		LODGING by respondent of decision of PUC of California in the Matter of UCAN.
70	Sep 26 1985	X	Reply brief of appellant Pacific Gas & Elec. Co. filed.
71	Oct 8 1985		ARGUED.

84-1044

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CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY
Appellant,

v.

PUBLIC UTILITIES COMMISSION of the
STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT AND APPENDIX THERETO OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

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QUESTION PRESENTED

Does an order of a state public utilities commission violate the First Amendment of the Constitution of the United States by compelling a privately-owned public utility to include in its monthly billing envelope the fund solicitation messages of a third-party?

THE PARTIES TO THIS PROCEEDING

The parties to this proceeding are: (1) Pacific Gas and Electric Company* (hereinafter "PGandE") (Appellant); (2) Public Utilities Commission of the State of California (hereinafter "CPUC" or "commission"); (3) Toward Utility Rate Normalization (hereinafter "TURN") (the real party in interest); (4) California Association of Utility Shareholders (hereinafter "CAUS") (Intervenor) and (5) Center for Law in the Public Interest (Intervenor).

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* PGandE is not owned by any parent company. The following is a list of PGandE's subsidiaries and affiliates and the percentage of each that PGandE owns:

Alberta Natural Gas Company Ltd (24.61%)[a]; ANGUS Chemical Company (34.90%)[a]; ANGUS Fine Chemicals Ltd. (27.92%)[a]; Angus Chemie GmbH. (34.90)[a]; ANGUS Petroleum Corporation (45.06%)[a]; Foothills Pipe Lines (South B.C.) Ltd. (12.06%)[a]; Pacific Gas Transmission Company (PGT) (50.17%)[a]; Pacific Indonesia LNG Company (50.00%); Pacific Transmission Supply Company (50.17%)[a]; Rocky Mountain Gas Transmission Company (50.17%)[a]; Standard Pacific Gas Line Incorporated (85.71%).

(a) Pacific Gas and Electric Company has an indirect interest in Alberta Natural Gas Company Ltd, ANGUS Chemical Company, ANGUS Fine Chemicals Ltd., ANGUS Chemie GmbH., ANGUS Petroleum Corporation, Foothills Pipe Lines (South B.C) Ltd., Pacific Transmission Supply Company, and Rocky Mountain Gas Transmission Company through its majority ownership of Pacific Gas Transmission Company. Pacific Gas Transmission Company owns 49.05% of Alberta Natural Gas Company Ltd, 42.16% of ANGUS Chemical Company and ANGUS Chemie GmbH., 33.73% of ANGUS fine Chemicals Ltd., 80% of ANGUS Petroleum Corporation, and 100% of Pacific Transmission Supply Company and Rocky Mountain Gas Transmission Company. Alberta Natural Gas Company Ltd owns 55.88% of ANGUS Chemical Company, 20% of ANGUS Petroleum Corporation, and 49% of Foothills Pipe Lines (South B.C.) Ltd. ANGUS Chemical Company owns 100% of ANGUS Chemie GmbH. and 80% of ANGUS Fine Chemicals Ltd.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY
Appellant,

v.

PUBLIC UTILITIES COMMISSION of the
STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT AND APPENDIX THERETO OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

PGandE appeals from the final judgment of the Supreme Court of California denying a Writ of Review of a decision of the CPUC holding that appellant's right of free speech guaranteed by the First Amendment of the United States Constitution is not violated by its regulatory order compelling appellant to publish the messages of a third-party in its monthly billing envelope. Appellant appeals on the basis that the order of the CPUC is unconstitutional in that it violates appellant's right of free speech as guaranteed by the First Amendment of the United States Constitution.

OPINION BELOW

The denial of the Writ of Review by the Supreme Court of California, which appears in the Appendix hereto page 73 *infra*, is not reported. The opinions of the CPUC dated December 20, 1983, (*TURN* v. *PGandE*, Decision No. 83-12-047, slip op., (Cal.PUC, Dec. 20, 1983) as modified on May 2, 1984, *TURN* v. *PGandE*, Decision No. 84-05-039, slip op., (Cal.PUC, May 2, 1984)) are printed in the appendix hereto, pages 1-61 *infra*.

JURISDICTION

The judgment of the Supreme Court of California, denying appellant's Writ of Review, was entered on October 4, 1984. A Notice of Appeal to this Court was duly filed in the Supreme Court of California on November 5, 1984. (See app., p. 74.) The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257, subdivision (2). (See also, *Atchinson Railway Co.* v. *Public Utilities Commission*, 346 U.S. 346, 348-349, (1953).)[1]

This appeal is being docketed in this Court within 90 days from the denial of the Writ of Review below.

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[1] This case involved an appeal from an order of the Public Utilities Commission of California. The California Supreme Court denied review, and the appellant appealed to this Court. In deciding the commission's order was equivalent to an act of the legislature for appeal purposes, the Court related:

> We think the Commission's orders must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 U.S.C. § 1257(2) (1948). *Live Oak Water Users' Assn.* v. *Railroad Commission*, 269 U.S. 354, 356; *Lake Erie & Western R. Co.* v. *Public Utilities Commission*, 249 U.S. 422, 424. The Commission has construed § 1202 as authorizing these orders. The appellants presented squarely to the Supreme Court of California their contention that in the allocation of costs, these orders take their property without due process of law and are so arbitrary and burdensome as to constitute an interference with interstate commerce, in violation of the Constitution of the United States. In sustaining the Commission's orders by denying writs of review, the Supreme Court of California upheld the statute as applied by the Commission, and the cases are properly here on appeal. (citation omitted) (*Atchinson Railroad Co.* v. *Public Utilities Commission*, 346 U.S. 346, 348-349 (1953).)

Similar to *Atchinson Railway*, here, the commission has construed California constitutional and statutory authority as authorizing it to compel appellant to open its billing envelope to a third party. (Dec. No. 83-12-047, slip op., at 35, (Cal.PUC, Dec. 20, 1983); app., pp. 26-27.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article XII, Section 5 of the Constitution of the State of California:

> The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

Article XII, Section 6 of the Constitution of the State of California:

> The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.

Section 701 of the California Public Utilities Code:

> The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

STATEMENT OF THE CASE

Factual Background

Appellant is regulated by appellee, the Public Utilities Commission of the State of California, which was established pursuant to Article XII of the California Constitution. Charged

with the duties and authorities that the Legislature has delegated to it in the Public Utilities Code of California, (Cal.Const., art. XII § 5) appellee's primary function is to regulate the rates and quality of services of utilities, including appellant.

One of the world's largest investor-owned, combined gas and electric utilities, appellant, incorporated in 1905, serves 48 of California's 58 counties (electric-47, gas-37). 3.6 million electric customers and 2.9 million gas customers receive service from appellant. Appellant has a responsibility to communicate with these customers on numerous matters, including appellant's ability to provide reliable and efficient service.

As a necessary adjunct to providing utility service, appellant, since December 1923, has published a monthly newsletter called *PGandE Progress (Progress)*. This publication is appellant's primary means of communicating with its customers. Through *Progress,* conservation messages and suggestions are conveyed, rate charges explained, and questions of general concern are answered. In addition, *Progress* occasionally carries articles that are unrelated to appellant's business, but are of general public interest. (See app., pp. 183-190.)

Progress is currently circulated to 3.7 million households. It is mailed each month to customers in the billing envelope at no additional cost to ratepayers. The cost of printing *Progress* is borne by stockholders and is not one of the estimated costs used to calculate rates.[2]

Under existing United States postal regulation, a bill must be sent by first-class mail at a cost of sixteen and one-half (16.5¢) to seventeen (17¢) cents.[3] For this cost, which is the minimum first-class rate, up to one ounce of material may be included in the envelope. A bill, even though weighing less than one ounce, cannot be mailed for less than the first-class rate.

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[2] A recent edition of *Progress* is included in the appendix hereto, pages 183-192 *infra*.

[3] The 17 cents postage charge applies to mail that is presorted by six digit zip code. The 16.5 cents postage charge applies to mail presorted by nine digit zip code.

Included with each mailing is the bill itself, the envelope in which it is mailed to the customer, a self-addressed return envelope in which the customer can return payment to PGandE, and an occasional legal notice. Because these items weigh less than one ounce, appellant, for the last sixty (60) years, has included *Progress* in its billing envelope without incurring any additional costs.

State Proceedings

The present case has its origin in appellant's 1982 general rate case, Application No. 60153, et. al. In that proceeding, Toward Utility Rate Normalization (TURN), a frequent intervenor in appellant's rate proceedings, contended that PGandE had violated 16 United States Code, section 2623, subsection (b)(5) and 16 United States Code, section 2625, subsection (h) of the Public Utility Regulatory Policies Act (PURPA) by including political communications in its billing envelope and in the envelope used to mail dividends to appellant's shareholders.

In *PGandE,* Decision No. 93887, 7 CPUC 2d 349 (1981) modified by *PGandE,* Decision No. 82-03-047, slip op. (Cal.PUC, Mar. 2, 1982)[4] the commission found that from time to time *Progress* contained items that could be considered political comment. (Dec. No. 93887, slip op. at pp. 158-59; app., pp. 64-65.) The CPUC, although recognizing that *Progress* is printed at shareholder expense and is sent in the envelope without additional cost to the ratepayer, nevertheless concluded that there are or may be many other uses for the "extra space."[5] Since *Progress* is sent in the envelope, the CPUC decided that the ratepayers lose the "opportunity cost" of using the envelope. (Dec. No. 93887, slip op., at 159c; app., p. 68.) In findings of fact number 58, the commission held that the "extra space" in the envelope is properly considered as ratepayer property. (Dec. No. 93887, slip op. at p. 220; app., p. 72.)

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[4] The pertinent portions of Decision No. 93887, slip op. (Cal.PUC, Dec. 30, 1981) are reprinted in the appendix hereto, p. 63 *infra*.

[5] Specifically, the commission defined: "extra space as the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." (Dec. No. 83-12-047, slip op., at p. 4; app., p. 3.)

The CPUC then examined how the extra space could be used more efficiently so ratepayers could realize this "opportunity cost". It considered: (1) banning the *Progress;* (2) establishing a "public access mechanism" requiring the utility to allow TURN or other groups to reply to political messages; (3) charging PGandE a fee for use of the extra space whenever the Company engaged in political speech; or (4) auctioning off the extra space to the "highest reputable commercial advertiser." (Dec. No. 93887, slip op., at pp. 159d-159f; app., pp. 66-71.) The commission did not, however, choose any of these "solutions."[6] Rather it invited:

> . . . TURN or any other interested party to file an application with this Commission with a proposed solution to the 'extra' space problem. *The application would seek an order from us to the utilities, such as PGandE, that they utilize the economic value of the 'extra space' more efficiently for ratepayers' benefit.* We caution, however, that we will not lightly adopt such an order and that *the considerable First Amendment problems must be fully addressed* in such application. (*Id.,* slip op., at 159g; app., p. 71.) (emphasis added).

On May 31, 1983, TURN filed a complaint with the CPUC (Docket No. 83-05-13) requesting access to appellant's billing envelope no fewer than four times per year for a two year period for the purpose of including a Consumer Advocacy

[6] Shortly after issuing Decision No. 93887, the commission granted a request to use the extra space in the billing envelopes of San Diego Gas and Electric Company (SDG&E) to solicit funds and create a consumer group to be called the San Diego Utility Consumers Action Network, Inc. (UCAN). (*Center For Public Interest Law* v. *SDG&E,* Decision No. 83-04-020, slip op., (Cal.PUC, Apr. 6, 1983), app., p. 90; (hereinafter the "UCAN Decision").) Several utilities sought to intervene in this case, but the commission denied their requests.

In reaching its decision in the UCAN case, the commission stated that the right involved is not so much a property right as an "equity right." (*Id.*, at 14; app., p. 100.) Although stating that not everything paid for with ratepayer money is the sole property of the ratepayer, the commission did not give any guidance as to which payments give the ratepayers an equity interest in utility property and which do not. (*Id.*, at 14; app., p. 100.)

Checkoff proposal.[7] (TURN's complaint is reprinted in the appendix hereto, pp. 75-89.) The "Consumer Advocacy Checkoff" proposal was open *only* to qualified organizations representing residential customers, and any funds so acquired would have to be used in PGandE proceedings. (app., p. 82.) On August 8, 1983, appellant filed its motion to dismiss TURN's complaint contending, *inter alia,* that the requested relief was unconstitutional because it would violate appellant's rights protected by the First, Fifth and Fourteenth Amendments of the United States Constitution. The motion was denied by the commission.

On December 20, 1983, by a 4 to 1 vote, the commission issued Decision No. 83-12-047 (slip op., (Cal.PUC, Dec. 20, 1983)) declining to adopt two of TURN's Consumer Advocacy Checkoff proposals, but granting TURN access to appellant's billing envelope four times per year for a two year period.[8] During such time, TURN's message must be accorded a priority position over *Progress.* (Dec. No. 84-05-039, slip op., (Cal.PUC, May 2, 1984); app., p. 45.)

Decision No. 83-12-047 attempts to explain more clearly the commission's ephemeral view of the ratepayer's interest in the extra space in the billing envelope. First, the commission stated that it had not really held that the billing envelope itself is ratepayer property. (Dec. No. 83-12-047; slip op., at p. 4; app., pp. 3-4.) Rather, it surmised that the extra space in the envelope is more like an "artifact", generated with ratepayer funds which has economic value. (*Id.,* at 5; app., p. 3.) And, to prevent appellant from benefitting from this economic value,

[7] TURN proposed three types of checkoff alternatives. The first two require the listing of various qualified consumer organizations. The main difference in the first two alternatives is the manner in which the qualified organizations are selected. The third alternative is less in the nature of a checkoff. Under this alternative, only TURN is allowed to solicit funds. (app., pp. 85-86.)

[8] The commission found that it would be premature to adopt the checkoff proposals since only TURN had sought access to the PGandE billing envelope. Therefore, the commission stated that two of the three checkoff proposals outlined by TURN in its complaint were "neither necessary nor practical." (Dec. No. 83-12-047, slip op., at p. 22; app., p. 17.)

reasoned the commission, the extra space, as a matter of equity, "is properly considered as ratepayer property." (*Id.*, at 5; app. p. 3.) Moreover, continued the commission, because of its past practice of requiring utilities to send legal, conservation, tax and rate notices in the billing envelopes, it had jurisdiction over the envelope extra space. (Dec. 84-05-039, slip op., at pp. 2-4; app., p. 47.) Specifically, the commission construed Article XII, Sections 5 and 6 of the California Constitution and California Public Utilities Code Section 701 as the constitutional and statutory authority for its order. (Dec. No. 83-12-047, slip op., at p. 35; app., p. 26-27.)

Then, relying on its UCAN Decision, the commission summarily rejected PGandE's First Amendment claims.[9] The commission held its action was a valid time, place and manner restriction, that the space belongs to the ratepayers and that its order was a narrowly-tailored means of serving the compelling state interest identified in the UCAN proceeding. (Dec. 83-12-047, slip op. at pp. 27-30; app., pp. 20-22.) Asserting that the envelope space is the ratepayers' property, not appellant's, the commission dismissed the Fifth Amendment taking issue. (*Id.*, at 36; app., p. 27.)

Applications for rehearing were filed by appellant and a number of other interested parties. On March 7, 1984, the commission issued Decision No. 84-03-045, extending its stay of the effectiveness of Decision No. 83-12-047. Thereafter, on May 2, 1984, by a 3-2 vote, the CPUC issued Decision No. 84-05-039 modifying Decision No. 83-12-047 and denying the requests for a new hearing. On June 4, 1984, appellant filed its Petition For Writ of Review with the Supreme Court of California challenging the constitutionality of the order. A

[9] Decision Numbers 83-12-047; (app., pp. 1-44) and 84-05-039; (app., pp. 45-61) are rife with references to the UCAN Decision. For example, Decision No. 83-12-047 adopts the so-called "compelling state interest" from the UCAN Decision. Decision No. 84-05-039 also quotes extensively from the UCAN Decision. This was done even though the commission specifically rejected requests for interventions in the UCAN proceeding by various utilities which alleged that the decision might affect them. The commission assured the utilities that the complaint would "in no way affects the rights and duties of other utilities." (Dec. No. 83-04-020, slip op., at p. 9; app., p. 96.) Despite this assurance, the commission used the UCAN decision as the primary basis for giving TURN access to appellant's billing envelope.

number of other interested parties from throughout the United States filed amici curiae briefs requesting the Supreme Court of California to review the commission's decision. On October 4, 1984, the Supreme Court of California denied, without comment, appellant's Writ of Review. (app., p. 73.)

THE FEDERAL QUESTION WAS RAISED BELOW

At the earliest possible stage of this proceeding, appellant raised the federal issue in a motion to dismiss filed with the commission on August 8, 1983. In that motion, appellant argued that the requested order was unconstitutional because it would violate rights protected by the First, Fifth and Fourteenth Amendments of the United States Constitution. All of appellant's claims were rejected.[10]

Appellant, in its Application for Rehearing filed with the CPUC on January 6, 1984, again raised the federal issues. In that application appellant argued, *inter alia,* that the commission's order was unconstitutional in that it violated the First Amendment of the Constitution of the United States. (*Application of Pacific Gas and Electric Company For Rehearing and Automatic Stay of Decision No.* 83-12-*047,* (1/6/84) pp. 5-8.) The CPUC rejected appellant's arguments and denied the application. Appellant reiterated its claim that the commission's order was unconstitutional in its Petition for Writ of Review filed with the California Supreme Court on June 4, 1984. (See *Petition For Writ of Review With Memorandum of Points And Authorities In Support Thereof,* (6/4/84).) Rather than accepting for review the substantial issues raised by appellant, the Supreme Court of California, on October 4, 1984, issued, without comment, its Order Denying Writ of Review. (app., p. 73.)

[10] Appointed by the Governor, commissioners are not required to have any legal expertise. (Cal. Const. art XII, § 1.) Of the five commissioners deciding this case only one is a member of the California bar, and he dissented from the majority.

REASONS WHY THE QUESTION IS SUBSTANTIAL

I

IMPORTANT CONSTITUTIONAL ISSUES THAT ARE NATIONAL IN SCOPE ARE RAISED BY THE DECISION BELOW

A. The Decision Below Raises Recurring Constitutional Issues Concerning Efforts Of Third Parties To Utilize Utility Billing Envelopes To Mail Their Messages.

The decision below decides constitutional issues of national importance. In several jurisdictions, including New York, Nevada and Oregon, consumer groups are demanding that utilities use the billing envelope to mail their messages. Legal challenges to third-party inserts have been brought (and are being contemplated) by various utilities throughout the nation. For example, Consolidated Edison Company of New York is currently challenging the constitutionality of an order of the New York Public Service Commission compelling Consolidated Edison to grant access to consumer groups mailings in its billing envelopes. (app., pp. 111-141.) On November 6, 1984, the electorate in Oregon approved a ballot initiative which compels Oregon utilities to carry third-party messages six (6) times per year. Failure to include such messages subjects a utility to possible conviction of a Class A misdemeanor. (app., pp. 142-150.)

Forcing utilities to grant consumer organizations access to their billing envelopes raises fundamental constitutional issues affecting every regulated business in the nation. If the utilities' billing envelopes can be made available to consumer organizations, it logically follows that extra utility vehicles, office space, computers and other facilities used to render customer service could also be made available to consumer groups.

B. The Decision Below Conflicts Directly With Decisions Of This Court Limiting The Right Of A State To Regulate A Utility's Billing Envelope And To Regulate Utility Speech.

In *Consolidated Edison Company* v. *Public Service Commission*, 447 U.S. 530 (1980), this Court held that a state must show a compelling state interest before it may regulate what a utility may insert in its billing envelope. Despite this ruling, the

commission below ordered appellant to open its billing envelope for use by a third-party without first demonstrating a compelling state interest for its order.

Following *Consolidated Edison*, this Court decided *Central Hudson Gas and Electric Corporation* v. *Public Service Commission*, 447 U.S. 557 (1980), which made clear that even commercial speech of a utility is protected by the First Amendment if it is lawful and not misleading. (*Id.*, at 566.) A state, under the *Central Hudson* analysis, may not regulate what goes into the billing envelope unless the "asserted governmental interest is substantial." (*Id.*) Moreover, before regulation is permissible the Court "must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." (*Id.*)

As more fully set forth, *infra*, pages 20-22, the commission's order in this case cannot survive the tests set forth in either *Consolidated Edison* or *Central Hudson*.

II

COMPELLING APPELLANT TO PUBLISH THE MESSAGE OF A THIRD-PARTY VIOLATES THE FIRST AMENDMENT.

A. The First Amendment Applies To Utilities.

The First Amendment's implication of forcing a privately-owned public utility to open its billing envelope to third parties to express their views therein is novel and substantial.[11] If, for example, the State of California were to order the Bank of America to include in its monthly checking account statements

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[11] The sharp disagreement on the commission regarding this issue continues. For example, on October 17, 1984, in *Comm. of More Than 1 Million Cal. Taxpayers To Save Prop. 13* v. *PGandE*, Decision No. 84-10-062, slip op., (Cal.PUC, October 17, 1984); app., pp. 157-164), the commissioners denied the request of a political group to insert material into utility billing envelopes. The commissioners concluded that the group should be denied access because: (1) the group did not allege it has participated or intends to participate in commission proceedings; and (2) the political group seeking use of the "extra" space did not allege that the group's use would improve consumer participation in commission proceedings.

In a concurring opinion, one commissioner stated that he would reject the request because he is not convinced that any group is entitled to "invade a

(Footnote continued on following page)

to customers the messages of consumer groups wishing to solicit funds to challenge the bank's practice of charging certain fees for returned checks, there would be no question that the regulation would be unconstitutional. Imposing a similar regulation on utilities is likewise unconstitutional. First Amendment protections extend to all persons, including an investor-owned public utility such as appellant. In *Consolidated Edison Company* v. *Public Service Commission, supra,* a case holding that a state regulatory agency may not ban a utility's bill inserts, this Court left no doubt that a utility, like other corporations, is protected by the First Amendment:

> The restriction on bill inserts cannot be upheld on the ground that Consolidated Edison is not entitled to freedom of speech. In *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), we rejected the contention that a State may confine corporate speech to specified issues. That decision recognized that '[*t*]*he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.* (citation omitted)' (447 U.S. at 533.) (emphasis added).

B. Appellant's First Amendment Rights Have Been Abridged.

1. Introduction

The commission's decision violates appellant's First Amendment rights in at least three different ways. First, it impairs appellant's right to communicate. Second, by mandating appellant to carry the messages of a third party, the decision forces appellant to associate with a stranger's messages and to speak even though it prefers to remain silent. Third, the decision ensnarls the commission in improper content analysis of competing messages, making government the ultimate arbitrator of what is communicated.

(Footnote continued from previous page)
public utility's billing envelope to convey their messages" and because he believes "other media and forums exist that are better suited to carry those messages. . . ." (*Id.*, Calvo, concurring; app., p. 163). Another commissioner concluded that ". . . I continue to believe that any and all such assignment of envelope space by this Commission to other entities is a deprivation of the constitutional rights of the subject utility companies." (*Id.*, Bagley, concurring; app., p. 164)

2. Appellant's Right To Communicate Has Been Infringed.

By requiring appellant to carry the messages of a stranger in its billing envelope, the commission disrupts and displaces appellant's mode of communicating with its customers utilized for the past 60 years. On at least four (4) occasions per year, the commission is either denying or severely restricting appellant's right to disseminate its own information to its customers. Whether or not appellant will be able to communicate with its customers through its billing envelope during these four months will hinge entirely upon TURN and its decision as to the length of its message or even the weight of paper it uses.

3. The Decision Below Forces Appellant To Associate With TURN's Message, And To Speak Even Though It Prefers To Remain Silent.

The principle that a state may not compel a person to carry a message against his will is firmly established. (*Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974); *Wooley* v. *Maynard,* 430 U.S. 705 (1977)). The right not to speak and not to express or associate with the views of others is an essential part of the First Amendment.[12] (*Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977).)

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[12] By requiring PGandE to send its bill and TURN's message together, the commission has given TURN's message a status it cannot achieve on its own. Sent by itself, TURN's solicitation probably could be easily identified as such from the TURN envelope and quickly discarded or kept based on its own identity. The recipient of appellant's billing envelope, however, will open the envelope and peruse its contents precisely because PGandE is sending the bill in it. Thus, TURN's message receives exposure and consideration it may not garner on its own. Furthermore, third party solicitations also will detract from PGandE's own communications. After receiving a number of such solicitations, the customer may come to expect the envelope to contain third party solicitations and will act accordingly. Consequently, PGandE's messages may suffer from the association.

The commission recognized that there is an "increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately." (Dec. No. 83-12-047, slip op., at p. 4 n.2; app. p. 3. n2.) Even the "increased probability" that customers may read TURN's insert if put in PGandE's envelope is not sufficient justification to abridge PGandE's First Amendment rights. A similar argument in *City Council of Los Angeles* v. *Taxpayers for Vincent,* ___U.S.___ 104 Sup.Ct. 2118, 2133 (1984), that "posting signs on [utility] property has advantages over [other] forms of expression" was rejected as a basis for allowing candidates for political office to place their signs on the city's utility poles.

The *Miami Herald* and *Wooley* cases have a direct bearing on the instant case. In *Miami Herald,* this Court rejected the idea that a state may compel a private person to publish the message of a third party. In that case, a Florida statute required newspapers to grant a right of reply to press criticism of a candidate for nomination or election. The Court specifically rejected the argument that the government has an interest in enforcing a right of access in order to enhance a variety of viewpoints. Chief Justice Burger, writing for the Court, observed:

> . . . The implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years. (*Id.*, at 254.)

The Court went on to hold:

> Compelling editors or publishers to publish that which 'reason' tells them should not be published is what is at issue in this case. *The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specific matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.* (citation omitted) (*Id.*, at 256.) (emphasis added).

Three years later, the Court decided *Wooley* v. *Maynard, supra,* a case in which a person was forced by the State of New Hampshire to display the State's message, "Live Free or Die," on his car's license plate. Like PGandE, the appellant in *Wooley* objected vigorously to carrying the message of a third party. In upholding the right of the appellant not to carry the state's message, the *Wooley* Court explained:

> A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. *The right to speak and the right to refrain from speaking are*

> *complimentary components of the broader concept of 'individual freedom of mind.'* (citation omitted) (*Id.*, at 714.) (emphasis added).

The prohibition against forcing one to publish a message against his or her will is not limited to the publishing activities of newspapers. Unlike *Miami Herald, Wooley* did not involve a newspaper-type publication. The appellant in *Wooley,* like other motorists licensed in New Hampshire, was forced to display the state's slogan on his automobile license plate. The crux of the *Wooley* decision, as identified by the Supreme Court, was that the state's interest, no matter how acceptable to some, "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." (*Id.*, at 717.) Likewise, in the instant case, the state's interest in providing TURN with an adequate fund raising mechanism cannot outweigh appellant's right not to become the "courier" for TURN's fund-raising messages.

The record below is devoid of any legal basis for forcing appellant to speak when it wishes to remain silent. In *Pruneyard Shopping Center* v. *Robins,* 447 U.S. 74 (1980), Mr. Justice Powell (concurring), citing *Stanley* v. *Georgia,* 394 U.S. 557 (1969), correctly pointed out some of the inherent problems of generalized forced access:

> The same principle may extend to state action that forces individual exposure to third-party messages. Thus, a law that required homeowners to permit speakers to congregate on their front lawns would be a massive and possibly unconstitutional intrusion into personal privacy and freedom of belief. (*Id.*, at 100, n. 4.) (Powell, concurring).

Moreover, continued Mr. Justice Powell: "If a state law mandated public access to the bulletin board of a freestanding store, hotel, office, or small shopping center, customers might well conclude that the messages reflect the view of the proprietor. The same would be true if the public were allowed to solicit or distribute pamphlets in the entrance area of a store or in a lobby of a private building." (*Id.*, at 99.) Likewise appellant in

the instant case is forced to speak even though it prefers to remain silent. Hence, it is faced with two choices. As put by Mr. Justice Powell:

> The property owner or proprietor would be faced with a choice: he either could permit his customers to receive a mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he has been forced to speak when he would prefer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues. The mere fact that he is free to dissociate himself from the views expressed on his property, (citation omitted), cannot restore his 'right to refrain from speaking at all. (citation omitted)' (*Id.*, at 99.)

Although the majority in *Pruneyard* upheld the right to petition in a shopping center, they recognized the unique character of a shopping center which "by choice of its owners is not limited to the personal use of [the owners]." (*Id.*, at 87.) Unlike a utility billing envelope, a shopping center "is instead a business establishment that is open to the public to come and go as they please." (*Id.*, at 87.) By contrast, appellant's billing envelopes have always been limited to appellant's private use and occasional commission legal notices. The public has never been invited to express its views therein. Clearly, PGandE's First Amendment rights have been impermissibly abridged because it is not only forced to associate with and be the courier of TURN's message, but also to speak even though it prefers to remain silent.

4. The Commission Improperly Evaluated The Content Of Speech

It is well-established that "when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' (citation omitted)" (*Consolidated Edison Co.* v. *Public Service Commission, supra,* 447 U.S. at 536.) The commission has violated this basic tenet by evaluating the relative merits of TURN's messages versus appellant's messages.

The commission readily admits that the primary purpose of the proceeding below was to determine "how to use the economic value of the extra space more efficiently for ratepayers' benefit." (*TURN* v. *PGandE,* Dec. No. 83-12-047, slip op., at p. 28 (Cal.PUC, Dec. 20, 1983); app., p. 21.) And, the commission justified its regulation on the grounds that consumers "will benefit more from exposure to a wide variety of views than they will from only that of PG&E." (*Id.*, at p. 23; app., p. 17.) In *Consolidated Edison,* the New York Public Service Commission "justifie[d] its ban [on utility speech] on the grounds that consumers will benefit from receiving 'useful' information. . . ." (*Id.,* at 537.) Rejecting this assertion, the Court replied: "The Commission's own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation." (*Id.*) Similarly, the decision below cannot be upheld as a content-neutral time, place, or manner restriction because it impermissibly determines whose speech is more important.

Without evaluating content, the commission could not conclude that sending TURN's inserts would be a more beneficial use of the extra space than allowing PGandE to fully utilize that space. To reach its conclusion, the CPUC either had to weigh the value of TURN's speech versus PGandE's speech, or to make an unsupported determination that TURN's solicitations would be a more efficient use of the extra space. In either case, the commission's action was impermissible. If the CPUC weighed TURN's message against PGandE's, it unlawfully evaluated the merits of the speech of the parties. If it simply proceeded on the supposition that TURN's solicitation is a more beneficial use, then that position is inconsistent with decisions of this Court which place the burden on the commission to demonstrate in the record why inserting TURN's message is a more beneficial use of the extra space.

III

THE STATE'S JUSTIFICATION FOR RESTRICTING APPELLANT'S FIRST AMENDMENT RIGHTS DOES NOT MEET THE COURT'S TEST FOR REGULATING SPEECH.

A. The State Must Demonstrate A Compelling State Interest And May Not Rely On Appellant's Status As A Utility As A Basis For Its Regulation.

This Court has consistently held that when First Amendment rights are abridged the normal presumptions of constitutionality do not apply. (*Thomas* v. *Collins,* 323 U.S. 516 (1945)). The state bears the heavy burden of showing the existence of a compelling governmental interest sufficient to justify the abridgment. (See *Thomas* v. *Collins, supra; Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Schneider* v. *State* (*Town of Irvington*), 308 U.S. (1939).)

This burden was not met in the proceedings below. Even though the record is devoid of evidence demonstrating a compelling state interest for regulating the contents of the billing envelope, the commission, nevertheless, concluded that: "In the present matter a compelling state interest in regulating the use of the extra space has been demonstrated and the TURN proposal as we adopt it does regulate that use in a constitutionally permissible way." (Dec. No. 83-12-047, slip op., at p. 29; app., p. 22.) In fact, the commission does not, and indeed cannot, cite any evidence in the record to support its conclusion. Rather, it relied heavily on appellant's status as a regulated monopoly as a basis for ordering appellant to include TURN's message in the billing envelope. (*Id.,* at 35; app., p. 26-27.)

By doing so, the commission incorrectly assumed that appellant's "monopoly" status diminished the application of the First Amendment. According to the commission: "even assuming that [appellant's] envelope is private property, it must not be forgotten that PG&E is a monopoly utility closely

regulated by this Commission pursuant to the authority derived from the State's constitution."[13] (Dec. No. 83-12-047, slip op., at 35; app., p. 26.) *In Consolidated Edison,* the New York Public Service Commission put forth an identical argument. In rejecting that argument, this Court observed:

> The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. *To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities,* just as local governments always have been able to use their police powers in the public interest to regulate private behavior. See *New Orleans* v. *Dukes,* 427 U. S. 297, 303 (1976) (*per curiam*). *But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent* that rests on the special interests of a government in overseeing the use of its property. (*Consolidated Edison Co.* v. *PSC, supra,* 447 U.S. at 540.) (emphasis added).

In *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978) the Court also made clear that whether government may restrict speech "by corporations turns on whether it [the regulation] can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech." (*Id.,* at 786.) Moreover, "the State may prevail only upon showing a subordinating interest which is compelling" (*Bates* v. *Little Rock,* 361 U.S. 516, 524 (1960)), and "the burden is on the government to show the existence of such an interest." (*Elrod* v. *Burns,* 427 U.S. 347, 362 (1976).) Finally, the State must not only demonstrate a compelling interest, but also must employ

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[13] In *Consolidated Edison Company* v. *Public Service Commission, supra,* 447 U.S. at 534, n. 1, this Court rejected this premise:

> Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights. We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. See generally *Public Media Center* v. *FCC,* 190 U. S. App. D. C. 425, 428, 429, 587 F. 2d 1322, 1325, 1326 (1978); *Pacific Gas & Electric Co.* v. *City of Berkeley,* 60 Cal. App. 3d 123, 127-129, 131 Cal. Rptr. 350, 352-353 (1976).

means "closely drawn to avoid unnecessary abridgment. . . ." (*Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976).) The commission has not identified a state interest which can survive this test.

B. The Extra Space Is Owned By Appellant And The First Amendment Issues Cannot Be Eliminated By Simply Redefining That Ownership.

The commission incorrectly concluded that the billing envelope extra space does not belong to appellant and erred by holding that it could eliminate the constitutional issues raised by its order by simply redefining the ownership of the extra space. Redefining the property interest in the extra space, the commission asserts:

> In granting TURN limited use of the billing space, we have not required PGandE to share its private property. Rather, we have reasonably determined that something which PGandE has *treated* as its own property is, in fact, the property of PGandE's ratepayers.[14] (*Turn* v. *PGandE* Dec. No. 84-05-039, slip op., at p. 9 (Cal.PUC, May 2, 1984); app., p. 52.) (emphasis in original).

This holding is inconsistent with established First Amendment principles and with established law. (*Board of Public Utility Commissioners* v. *New York Telephone Co., supra.*)

[14] This ruling is inconsistent with *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23 (1926), where this Court stated:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or to other operating expenses, or to the capital of the company. *By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience* or in the funds of the company. (*Id.*, at 32.) (emphasis added).

This principle is a basic premise of utility regulation. (See *Philadelphia Suburban Water Company* v. *Pennsylvania Public Utility Commission*, 427 A.2d 1244 (1981); *Village of Wellsville* v. *Maltbie*, 15 N.Y.S.2d 580, 585 (1930).) For example, in *Duke Power Company*, (Opin. No. 641, 48 FPC 1384, (Dec. 12, 1972)), the Federal Power Commission (now the Federal Energy Regulatory Commission) observed: "Property paid for out of monies received for service belongs to the Company just as that purchased out of proceeds of its bonds and stocks." (*Id.*, at 395.) In *United Railways & Electric Co. of Baltimore* v. *West*, 280 U.S. 234, 249 (1930) [This case was overruled on other grounds in *Federal Power Commission* v. *Hope Natural Gas Company* 320 U.S. 591 (1944)], this Court confirmed that: "The property of a public utility, although dedicated to the public service and impressed with a public interest is still private property."

Below, the commission correctly states that the billing envelope is the property of appellant, but incorrectly concludes that the extra space therein is property of the ratepayers. (Dec. No. 83-12-047, slip op., at pp. 4-5; app. pp. 2-3.) But, even if the ratepayers do, in fact, own the extra space, the commission's order still violates the First Amendment.

Regardless how the ownership of that extra space is defined, the commission's regulation of what goes into appellant's envelope must still meet constitutional standards. This Court's decision in *Consolidated Edison Co.* v. *Public Service Commission, supra,* made clear that state regulation of utility billing envelopes must be governed by the state's ability to "demonstrate that its regulation is constitutionally permissible." (447 U.S. at 535.) This requirement cannot be negated, as was done by the commission below, by redefining the ownership of the extra space.

Expressly rejecting the New York Commission's assertions that it could regulate the utility's billing envelope "in the public interest" (*Id.*, at 540), the *Consolidated Edison* Court held that any regulation undertaken "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." (*Id.*)

On the same day *Consolidated Edison* was decided, this Court decided *Central Hudson Gas and Electric Co.* v. *Public Service Commission, supra,* which firmly established that a commission cannot regulate utility speech without complying with constitutional standards. In *Central Hudson* the New York Commission completely banned an electric utility from advertising to promote the use of electricity. Although recognizing that a state may regulate utility speech, the Court, nevertheless, held that any such "regulatory technique may extend only as far as the interest it serves." (447 U.S. at 565.)

Therefore, a state cannot evade constitutional standards by merely redefining the activity (here, the extra space) regulated.[15] The overriding principles set forth in *Central Hudson*

[15] In a recent law review article, the author opined that the commission's ownership analysis was incorrect:

> The fact that ratepayers pay for envelope and postage costs is an insufficient reason to give them rights to extra envelope space. Consumers may not take property rights to a company's service and billing

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are that the "State must assert a substantial interest" (*Id.*, at 564) and "the regulatory technique must be in proportion to that interest." (*Id.*) In *Central Hudson*, where the validity of state regulation of utility commercial speech was at issue, this Court set forth standards for regulation of utility speech which apply regardless of ownership of the extra space:

> First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive. (*Id.*, at 564.)

Moreover, any "limitation on expression must be designed carefully to achieve the state's goal." (*Id.*) Ownership of the extra space is irrevelant when measuring state regulation against required constitutional standards.

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mechanism merely because they pay for the mechanism. Property rights are acquired through the creation, purchase or possession of a thing. Under the common meaning of the words, ratepayers are neither creators nor possessors of the utility's billing envelopes. The Commission's decision is more simply understood as based on the premise that the utility has no rights to extra envelope space.

The premise is in error. States may regulate public utilities, but they may not act as owners of public utility property. A public utility is a private property owner able to use and sell its property, subject to state regulation. Items purchased by the utility to provide service to the public are utility property. For example, if a utility has a franchise to install a power pole, then loses the franchise it nonetheless owns the pole and may not be denied its property without just compensation. Like a corporation's loss of charter, a utility's franchise loss has no effect on property rights. Utility property rights are those of the investors and exist apart from regulation. Without regulation, envelopes used by the utility would be utility property. Because regulation does not transfer property rights, a regulated utility's billing envelopes still belong to the utility.

. . . Clearly, billing envelopes are utility property and a transfer of property rights is required to make them ratepayer property. (Citations omitted). "Access To Public Utility Communications: Limits Under The Fifth And First Amendments," (21 *San Diego Law Review* 391, 397-399 (1984).)

C. The Interest Identified Is Neither Compelling Nor Consistent With Permissible Regulation Under The First Amendment.

The commission identified the state interest to be served as the assurance of "the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." (Dec. No. 83-12-047, slip op., at p. 29; app., p. 22; (quoting Dec. No. 83-04-020, at p. 17; app., p. 103).) This goal, however, is not compelling. It falls far short of the test required for governmental regulation of speech.

In *Buckley* v. *Valeo, supra,* the government sought to promote a more balanced market place of ideas by limiting the amount that could be expended in certain political campaigns, therefore, curtailing the speech of those who had the means of communicating. The governmental interest stated in *Buckley* was analogous to the commission's interest in enhancing TURN's voice in order to achieve fuller consumer participation and understanding of commission proceedings. The *Buckley* Court found that the government's stated interest could not support infringement of speech because "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." (*Id.*, at 48-49.) Here, more so than in *Buckley,* the state's interest in improving the flow of ideas is perniciously pursued by commandeering appellant's billing envelope and by appropriating some of appellant's resources to enhance TURN's voice.[16]

D. The Commission's Order Is Not Narrowly Drawn Because It Ignores Readily Available Alternatives.

This Court has long recognized that governmental regulation of speech, when permitted, must be narrowly tailored to serve the identified compelling governmental interest. If a less

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[16] For example, the Commission mandated: "In addition to ordering PGandE to make space available we are also ordering it to do one thing further, and that is to use its equipment to put the inserts of others into the billing envelope extra space." (Dec. No. 83-12-047, slip op., p. 31; app., p. 23.)

drastic means is available, or if other means are available which would not infringe First Amendment rights, more drastic means interfering with the First Amendment may not be employed. (*Shelton* v. *Tucker,* 364 U.S. 479 (1960).) In *Shelton* v. *Tucker, supra,* the Court emphasized that even if "the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*Id.,* at 488.) Even in non-First Amendment cases, this Court adheres to the doctrine that when the government has available a variety of equally effective means of achieving a given end, it must choose the method which least interferes with individual liberties.[17] The commission, however, has completely ignored this requirement and chosen one of the most restrictive methods available.

Without closely drawn means to avoid unnecessary abridgment, governmental regulation of First Amendment activity, even when permissible, cannot prevail. As emphasized by this Court in *Kusper* v. *Pontikes,* 414 U.S. 51, 58-59 (1973):

> For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. [Citation omitted]. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." [Citation omitted]. If the state has opened to it a less drastic way of satisfying its legitimate interest, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. (citation omitted). (*Id.,* at 59.)

Promoting participation in commission proceedings could be equally or perhaps better served by a number of other means which do not infringe upon appellant's First Amendment rights. For instance, public funding of mailings by intervenor groups could be implemented. In addition, awarding attorney or intervenor fees to successful intervenors provides a

[17] E.g., *Griswold* v. *Connecticut,* 381 U.S. 479, 485 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 507-508 (1964); *Dean Milk Company* v. *City of Madison,* 340 U.S. 349, 354 (1951); see also, Comment, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 464 (1968).

direct incentive and reward for participation in commission cases.[18] Fee awards also allow the commission to ensure that the dollars received are related to the commission proceeding involved.[19] Moreover, such awards allow an unlimited number of groups, not just TURN, to be eligible to receive fees for participating in commission proceedings based upon judicially accepted standards.[20] Thus, groups representing all the different consumer interests would have a fair opportunity for funding, without violating appellant's First Amendment rights.

Pointing out that TURN has numerous alternatives for communicating its views and that the majority's decision below unnecessarily abridged PGandE's First Amendment rights, Commissioner Calvo, dissenting, correctly observed that:

> TURN has other opportunities to reach its natural audience. It may solicit support through its own mailings. Additionally, our rules regarding intervenor fees are frequently used to reward TURN's good efforts and, in fact, in another action today we award TURN $13,102 in attorney's fees for its contribution in a Commission rate case proceeding. I question, therefore, if TURN or any other party *needs* access to the billing envelope in order to be an effective participant in our proceedings. (emphasis the commissioner's; Dec. No. 84-05-039, slip op., at p. 2, Calvo; dissenting; app., p. 56.)

[18] The Public Utility Regulatory Policies Act (PURPA) provided a basis for the commission to adopt rules for awarding reasonable fees and costs to intervenors making contributions in specified areas in proceedings involving electric utilities. (16 U.S.C. § 2632 (1978)) The commission has adopted rules to implement this legislation. (See Rule 76.01 et seq. of the commission's Rules of Practice and Procedure reprinted in the appendix hereto, pp. 165-182.)

[19] This would eliminate the commission's requirement that TURN establish "an adequate mechanism to account for the receipt and disbursal of funds received through the bill insert process." (*TURN* v. *PGandE* Dec. No. 83-12-047, slip op., at p. 24 (Cal.PUC, Dec. 20, 1983); app., p. 18.)

[20] On July 5, 1984, California's Governor signed onto law Intervenor's Fees and Expenses legislation which authorizes the commission to award reasonable advocate's fees, expert witness fees, and other cost of participation or intervention in any hearing or proceeding before the commission relating to utility rates. (See 1984 Cal. Legis. Serv. Ch. 297 (West); app., p. 151.)

Finally, it must be emphasized again that, even if the commission's purpose is legitimate and represents a compelling or substantial governmental purpose, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (*Shelton* v. *Tucker, supra,* 364 U.S. at 488.) The commission decision below fails to pass this test.[21]

CONCLUSION

This case raises substantial national issues of first impression involving fundamental constitutional rights of appellant and numerous other similarly situated parties. To ensure that these issues are resolved in a constitutional manner, it is respectfully submitted that this Court should note probable jurisdiction and grant plenary consideration of this appeal.

Respectfully submitted,

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Dated: December 28, 1984

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[21] Just recently, in *City Council of Los Angeles* v. *Taxpayers For Vincent,* ___ U.S. ___, 104 Sup.Ct. 2118 (1984), a city council candidate, citing the advantages of placing political signs on utility poles, attacked a city ordinance which prohited such placement. Upholding the validity of the ordinance prohibiting the placement of signs on utility poles, the Court observed: "There is no reason to believe that these same advantages cannot be obtained through other means." (*Id.,* at 2123.)

84-1044

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ALEXANDER L. STEVAS
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPENDIX TO THE JUDISDICTIONAL STATEMENT OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

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APPENDIX A

Decision 83-12-047

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, *Complainant,* vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, *Defendant.*	**Case 83-05-13 (Filed May 31, 1983)**

ROBERT SPERTUS, MICHEL PETER FLORIO, and JOHN F. ELLIOTT, *Attorneys at Law,* and SYLVIA M. SIEGEL, *for complainant.*

PETER W. HANSCHEN, ROBERT HARRIS, and SHIRLEY WOO, *Attorneys at Law, for defendant.*

WILLIAM L. KNECHT, *Attorney at Law, for California Association of Utility Shareholders;* and ETHAN SCHULMAN and HARVEY ROSENFIELD, *Attorneys at Law, for Center for Law in the Public Interest, intervenors.*

DIANE I. FELLMAN, *Attorney at Law, for the Commission staff.*

OPINION

Summary

By this decision the Commission grants, in modified form, the complaint of Toward Utility Rate Normalization (TURN) proposing access to the extra space in Pacific Gas and Electric Company's (PG&E) billing envelope by consumer representative organizations for the purpose of soliciting funds to be used for residential ratepayer representation in proceedings of this Commission involving PG&E.

The decision addresses the effect of prior Commission determinations on the ownership of the billing envelope extra space; procedural issues raised by the parties; jurisdictional attacks on the Commission's authority to grant the relief requested, including constitutional issues; and the merits of the proposal.

Introduction

The parties and subject matter of this case are not new to us. The issue was first raised by TURN as an intervenor in the proceedings of the rate application filed by PG&E in late 1980 (Application 60153). In those proceedings TURN argued, among other things, that this Commission should find PG&E's inclusion of its publication, *Progress*, in the customers' billing envelopes to be improper because it violated the advertising standards of the Public Utility Regulatory Procedures Act of 1978 (PURPA), 16 U.S.C. Section 2601, et seq., by which PG&E was bound.[1] At the time TURN's primary concern was not how the billing envelope space should be used but preventing PG&E from using it in a way TURN believed to be illegal.

In developing its argument on this point TURN suggested certain possible legal bases for this Commission's controlling such envelope use. One was for the Commission to restrict PG&E's use based on a finding that the envelope was ratepayer property—an idea first propounded by Justice Blackmun in his dissent in *Consolidated Edison Co. v. Public Service Commission* (1979) 447 US 530, 534, N.1. (*Con Ed*).

In our decision on the application, Decision (D.) 93887 issued December 30, 1981 (as modified by D.82-03-047 issued March 2, 1982), we concluded that, as TURN asserted, we had adopted the PURPA political advertising standards, that PG&E was bound by them, and that PG&E had engaged in political advertising in the *Progress* from time to time in violation of the PURPA prohibitions. We did not adopt the

[1]The relevant PURPA sections prohibit a utility from recovering from its ratepayers any direct or indirect expenditure for political advertising.

idea that the envelope itself is ratepayer property, as TURN suggested. However, we did find that the "extra space" in the billing envelope is ratepayer property. (D.93887 as modified, Finding of Fact 58, p. 220.) We defined extra space as the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost.

Our conclusion concerning the ownership of the extra space resulted from our analysis of the unique factors which allow this issue to exist. It was clear then as it is now that envelope and postage costs and any other costs of mailing bills are a necessary part of providing utility service to the customer, so the costs are a legitimate revenue requirement which we should, and do, permit PG&E to include in the rates it collects from ratepayers. However, due to the nature of postal rates (which are assessed in increments of one ounce) extra space exists in these billing envelopes. If we regarded that extra space as the property of PG&E, then the result would be that along with PG&E's legitimate cost of mailing it would also be entitled to profit from the economic value of that extra space.[2] Such a result is inequitable because it provides PG&E with a benefit beyond the mailing expense legitimately recoverable from the ratepayers. Mindful that the extra space is an artifact generated with ratepayer funds, and is not an intended or necessary item of rate base, and that the only alternative treatment would unjustly enrich PG&E and simultaneously deprive the ratepayers of the value of that space, we concluded that the extra space in the billing envelope "is properly considered as ratepayer property". (D.93887, Finding of Fact 58, p.220.)

[2]As we stated in D.93887, there is no question that this space has value. Quantification of that value, though, is necessarily subjective and imprecise since it is dependent on a number of variables such as the nature of the insert, the identity of the beneficiary or beneficiaries of the communication and some alternative means of conveying the same information to the same people. It may also include such intangibles as the aura of goodwill created around the proponent of the message or some other party, and the increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately.

We reiterated our view that such a conclusion was mandated by the equities of the situation when, in our decision in *Center for Public Interest Law and Robert L. Simmons v. San Diego Gas & Electric Company*, D.83-04-020 decided April 6, 1983,[3] we stated:

> "We have stated that the extra space belongs to the ratepayers. In so doing, we are not so much describing a traditional property right as an equity right. . . . ...we are saying that the *reason* the ratepayers pay for the billing envelopes and postage is that those costs are an expense necessary to the operation of the utility. So, what the ratepayers are legitimately paying for is the conveyance of their bills and occasional legally mandated notices. Since these documents together do not generally add up to one ounce . . . the ratepayer has paid for some empty space . . ." (P.14.)

In the present matter TURN has filed a complaint against PG&E for not permitting access to the extra space in its billing envelopes by intervenors for the purpose of soliciting voluntary donations to be used to represent residential ratepayers in Commission proceedings involving PG&E. This complaint is a response to the invitation we made in D.93887:

> ". . . We invite TURN or any other interested party to file a complaint with this Commission with a proposed solution to this 'extra' space problem. The complaint would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the 'extra space' more efficiently for the ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such complaint." (P.159(g) as modified.)

TURN's complaint lists three alternative "Consumer Advocacy Checkoff" proposals. Each alternative proposal calls for a billing envelope extra space insert, as a two-year experiment, which (1) explains the program, (2) sets forth a list

[3]This case is also known as the "UCAN" case because it proposed establishment of the Utility Consumers Action Network or UCAN.

of pending and anticipated PG&E applications and other cases likely to have a significant effect on customers' rates and services, and (3) invites voluntary donations to support advocacy by consumer organizations (identified on a check-off list by name, address, and date of incorporation) on behalf of PG&E's residential customers before the Commission. The insert would also include a return envelope for mailing donations to a central collection point for transmittal to the organization or organizations checked off on the list.

The alternatives differ from one another in the following specifics:

a. Proposal 1 would require the Commission or its designated representative, such as the Public Advisor, to produce and write the insert. Donations would be sent to the care of the Public Advisor for transmittal to the various organizations.

b. Proposal 2 is the same as Proposal 1 except that the functions assigned to the Commission or its designated representative would be performed by or under the supervision of a "blue ribbon" panel appointed by the Commission with the assistance of its Public Advisor.

c. Proposal 3 would allow only TURN to solicit donations by way of an insert, similar in format to the others, but prepared by TURN.

A prehearing conference was held on this matter before Administrative Law Judge (ALJ) Baer on August 9, 1983 in the Commission's Courtroom in San Francisco. A hearing was held in the same place before ALJ Colgan on September 12 through 15, 1983. The right to intervene was requested by two parties: the California Association of Utility Shareholders (CAUS) and the California Public Interest Research Group (Cal PIRG). Both were granted. Only CAUS actually participated in the hearing or filed briefs. The Commission Staff through the Legal Division participated by cross-examining witnesses and filing briefs.

The matter was submitted on September 15, pending receipt of one late-filed exhibit on September 21, 1983, simultaneous closing briefs due September 28, 1983 and simultaneous reply briefs ~~due~~ October 4, 1983.

Effect of Prior Decision

The ordering paragraphs in D.93887 did not address the extra space issue. PG&E's position is that our statements in D.93887 about the extra space are *dicta* because our discussion of ownership of the envelope space did not address third party access but was only for the limited purpose of "explaining that a value can be assessed to the 'extra' space" in the context of our determination of whether a PURPA violation existed. Therefore, PG&E concludes our statements in D.93887 about the extra space are not subject to the rules of collateral estoppel or to Public Utilities (PU) Code Section 1709 which states:

> "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

We need not decide this issue to arrive at a proper disposition of TURN'S complaint. Whether or not the rules of collateral estoppel apply to our findings and statements in D.93887 as to the ownership of the extra space, those findings and statements were made after a full hearing and opportunity to brief the issues. PG&E has not persuaded us that there is any reason to relitigate those questions at this juncture and we shall not do so. We consider findings of fact 58, 58(a), 59 and 60 of D.93887 as being final for purpose of this proceeding.

Disputed Evidence

PG&E Survey

The effect of D.93887 is also important in dealing with an evidentiary matter which arose during the hearing when PG&E attempted to offer a document of over 100 pages (marked Exhibit 12) entitled "Progress: A Readership Study".

According to PG&E's offer of proof, the document would have shown that "Progress is a useful and efficient use of the billing space, that it is a valued publication received by the ratepayers, and that it has an effective conservation measure [sic] be presented." (RT 597-598) Counsel for PG&E also claimed that the document would be useful to the Commission as a basis for determining who would use the billing envelope more efficiently and effectively (generally RT 585-599). In conjunction with this exhibit, PG&E also offered questions and answers 10 through 17 of the prepared testimony of its witness, Gerald W. Sword (marked as Exhibit 11).

Counsel for TURN objected to the admission of both documents on the ground of relevancy and as improper rebuttal testimony. The objection was sustained as to both documents by the ALJ.

In its opening brief PG&E again argues that these documents properly rebut the second sentence of paragraph 11 of the complaint, which states:

> "Therefore, this use of the extra space in the PG&E billing envelope is a more effective use of the economic value of that space than that provided by the existing alternatives, i.e., the dissemination of the 'PG&E Progress' and/or the non-use of the extra space."

PG&E also argues that the ALJ'S ruling, which relied on the impropriety of the evidence as rebuttal, applied the rules of evidence and procedure" so egregiously as to deny PG&E procedural due process". (PG&E's Concurrent Opening Brief, p.16.) As a consequence PG&E requests the Commission to reopen the proceeding and accept the complete testimony of Gerald W. Sword and the study. We decline to do that. The ALJ's ruling on these two documents was proper.

PG&E's argument implies that it is necessary or appropriate to weigh the "value" of inclusion of the *Progress*—as measured by ratepayer perception—against whatever other use might be proposed for the extra space—apparently as measured by the same yardstick. In so arguing, PG&E ignores the fact that we laid that issue to rest in D.93887. We said:

"Use of the space for the *Progress* instead of some other purposes deprives the ratepayers of that 'value' which they own." (P.159b.)

Thus, while in Finding of Fact 60 of D.93887 we stated that the "most efficient means of capturing for ratepayers' benefit the full economic value of the extra space remains to be determined in a future proceeding," we made that statement in the added context of having determined that the extra space belongs to the ratepayers.

It was not our intent then, nor is it now, to involve ourselves in judging the relative merit of the speech of different factions. "It is not the content [of the *Progress*] that we are concerned with," we stated in D.93887 (p.159d).

By our statement in Finding of Fact 60 we intended to suggest to future complainants that we needed more information in order to decide in a constitutionally equitable and practical manner how to neutrally determine who should have access to the extra space and how such access should be apportioned.

Therefore, any evidence proferred for the purpose of establishing the perceived merit of the content of the *Progress* is irrelevant to this proceeding and was properly excluded.

Thomas C. Long's Testimony

PG&E also offered testimony of Long (Exhibit 10). TURN objected to the admission of questions and answers 5 and 6 and Table 1, and staff joined that objection and also objected to the relevance of questions and answers 7 and 8. After a great deal of oral argument the ALJ took the objections under submission pending receipt of written argument. Examination and cross-examination proceeded as if the testimony had been received.

As counsel for PG&E explained, questions and answers 5 and 6 and Table 1 are for the purpose of showing that the revenue requirement which has been allowed for bill mailing expenses has not been sufficient to cover actual costs due to

postage increases in the last several years. We find this evidence is relevant to the jurisdictional issues raised by PG&E and questions and answers 5 and 6 and Table 1 will be received. Question 7 appears to be addressed to the expertise of this witness; however, part of that answer and all of question and answer 8 go to opinion outside Long's area of expertise. Nonetheless, due to the nature of the inquiry and the extensive cross-examination which took place on these items, we think it inappropriate to delete these questions and answers since it would require a fruitless exercise in determining which part of Long's lengthy cross- and redirect-examination should also be stricken.

Long testified that amounts authorized to be collected for mailing expenses were not sufficient to cover actual costs during certain periods of time between 1971 and 1981 because postage rates rose. He concluded that since PG&E is responsible for bill mailing expense even if rates are inadequate to cover it during the future test year, PG&E "is vested with cost responsibility". This testimony does not alter our opinion regarding ownership of the extra space. Variation between amounts adopted for ratemaking and actual expenses is inevitable in test year ratemaking. It has clearly been this Commission's policy to include in rates an amount sufficient to cover all reasonable bill mailing expense. The fact that in hindsight these amounts did not precisely reflect PG&E's actual expenditures for postage during certain periods of time does not detract from that fact or justify our treatment of the extra billing envelope space as the property of the utility rather than of the ratepayers.

Motions to Dismiss

In addition to the substantive constitutional grounds which we address elsewhere, PG&E has also moved to dismiss the complaint on a number of procedural bases, which are discussed below.

a. Failure to Follow the Commission's Directive in D.93887 to Discuss the First Amendment in the Complaint.

Pointing to our invitation to parties in D.93887 to file a complaint about matters such as this one, and specifically

noting our statement that "the considerable First Amendment problems must be fully addressed in such complaint", PG&E contends TURN's complaint should be dismissed because the complaint itself does not address the First Amendment. PG&E assumes that that is what we meant to require by our statement in D.93887. While our statement might have been more artfully worded, we certainly did not intend to depart from our established practice by requiring legal argument to be part of a complaint. The complaint merely *alleges* the activity or practice which complainant believes to be improper. Legal principles applicable to the allegations are set forth in briefs or oral argument after the facts have been elicited in a hearing.

Our statement about the First Amendment was merely meant to alert any future litigants on this issue that we would not adopt any proposal unless the proceeding instigated by the complaint presented us with a record which fully addressed the First Amendment problems which such a proposal might raise. In this case, the First Amendment problems were first addressed by PG&E in its Motion to Dismiss filed prior to the hearing. The First Amendment issues were addressed further in the parties' responses to PG&E's motion and in their opening and closing briefs. Since the First Amendment problems have been fully addressed as required by D.93887, we will reject the motion to dismiss on this procedural basis.

b. Failure to State a Cause of Action

PG&E states that the complaint does not set forth "any act or thing done by any public utility . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission . . ." as required by PU Code Section 1702, the complaint provision.

While this matter may seem to fall between the cracks when PU Code Section 1702 is applied to the facts alleged, there is a broader mandate applicable here. PU Code Section 705 states:

> "Whenever in Articles 2, 3, and 4 of this chapter a hearing by the commission is required, the hearing may be had either upon complaint or upon motion of the commission."

Such a hearing is a prerequisite to our determining whether a utility's practices are "unjust, unreasonable, unsafe, improper, inadequate, or insufficient." Based on that we then, by order or rule, fix the practices to be followed. See PU Code Section 761 (Article 3). PU Code Section 728 (Article 2), which gives us the right to "determine and fix, by order, the just, reasonable, or sufficient . . . practices . . ." to be observed should we find a utility's practices affecting rates to be "insufficient, unlawful, unjust, unreasonable, discriminatory, or preferrential . . . ," also requires a hearing.

Thus, we conclude that a complaint alleging unjust or improper practices as was filed here complies fully with statutory requirements and we will deny the motions to dismiss based on that ground.

c. Failure to Sign Complaint

PG&E also notes that TURN's complaint in this matter was not signed as required by Rule 4 of our Rules of Practice and Procedure (Title 20, California Administrative Code, Section 4). While this is apparently accurate, it was not noticed by our Docket Office at the time of filing. If it had been, it would have been rejected until remedied. The matter was in hearing before this technical issue arose.

The prepared testimony of the two witnesses for TURN together sponsors each allegation of the complaint. Sylvia Siegel, executive director, and Michel Peter Florio, attorney, testified extensively under oath on both direct- and cross-examination.

The purpose of Rule 4 is to guard against frivolous vexatious, harassing filings by requiring the responsible parties to attest to the allegations.

As a result of Siegel's and Florio's testimony, all the allegations have been attested to and the purpose of Rule 4 has been served. Thus we think it appropriate to invoke the equitable consideration authorized by Rule 87 which, in pertinent part, states:

> "These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues

presented. In special cases and for good cause shown, the Commission may permit deviations from the rules. . . ."

Other Jurisdictional Claims

a. The Dedication Issue

CAUS takes the position that this Commission may not order PG&E to allow others to use billing envelope space because PG&E has not dedicated that space to public use. Since the space has not been so dedicated, CAUS asserts, the Commission lacks jurisdiction to grant the relief sought. To support this position CAUS cites our decision in *Holocard v PT&T et al.* (1981) 6 CPUC 2d 649 as corrected by D.92980; modified and rehearing denied by D.93362 (1981). *Holocard* is clearly inapposite to the present matter. That case involved a proposed business (Holocard) seeking an order requiring the utility to participate in the operation of the business to the extent of billing Holocard's customers, on Holocard's behalf. In rejecting Holocard's claim we discussed the traditional principle of dedication of utility property to public service which we have relied upon over the years. Obviously, however, where the property in question (the extra space) belongs to the ratepayer, this principle cannot be applied.

Furthermore, all the dedication cases have in common an attempt to require the utility to commence some new service. As TURN properly points out, "[t]his proceeding simply does not present a dedication question, because TURN is not requesting a new public utility service." (TURN reply brief p.33.)

TURN proposes that we order PG&E to refrain from exercising exclusive control over the extra space so that TURN and perhaps some other entities may have access to it. This is not equivalent to new utility service, it is merely a proposal for more efficient use of existing service. Such Commission action is certainly within the ambit of authority described in PU Code Section 761.

b. Management Prerogative

As both CAUS and PG&E note in their post-hearing briefs, the value of utility property that has been rented to others (e.g. pole space or office space) can be credited by the Commission against revenue requirements in rate setting proceedings. PG&E additionally points out that we may not, consistent with the rule set forth in *Pacific Telephone and Telegraph Co. v Public Utilities Commission* (1950) 34 C 2d 822, and other earlier cases, interfere with actual management decisions regarding the activities themselves. When the subject is utility property, that observation is generally true. However, it does not pertain to the extra space since, as we have explained, that space is *not* utility property.

Furthermore, as the case above makes clear, "[t]he primary purpose of the Public Utilities Act [citations omitted] is to insure the public adequate service at reasonable rates without discrimination." 34 C 2d 822, 826.[4] A practice which recoups the economic value of the extra space for PG&E in addition to recouping the costs of mailing discriminates against the ratepayers since it would be impossible for this Commission to credit any amount certain against revenue requirement because the value of the space might fluctuate from message to message, time to time, and customer to customer, as described in footnote 2, supra. Therefore, we reject the claim of PG&E and CAUS that we lack jurisdiction over the present matter because it constitutes improper interference with a proper management prerogative.

Relative to this management prerogative argument PG&E suggests that even if the billing envelope were public property, the case law still permits PG&E to deny access to third parties. However, in citing *Danskin v San Diego Unified School District* (1946) 28 C 2d 536; *Adderley v Florida* (1966) 385 US 39, 17 L ed 2d 559; and *Lehman v City of Shaker Heights, et al.* (1973) 418 US 298, 41 L ed 2d 770, PG&E misses the crucial point

[4]In a recent discussion of the "invasion of management" rationale in this case the Supreme Court stated: "Later cases . . . have cast serious doubt on the continuing validity of much of the reasoning in *Pac. Tel.*" *General Telephone Company of California v Publ. Util. Comm.* S.F. 24459 (filed Oct. 20, 1983), slip opinion at 12.

that it is the governmental entity in charge of the public facility which has the prerogative, under certain circumstances, to restrict access to the facility. Presumably, under this line of cases, if we had determined that the billing envelope was public property, which we have not, it would then be the Commission which had the authority to determine how access could be restricted. The conclusion that such authority would rest with PG&E is not supported by these cases.

The Nature of TURN

Both PG&E and CAUS argue that even if the Commission does have the right to order PG&E to make this extra space available ot others, allowing TURN such access would still be improper because TURN is not a democratically instituted organization, it is not consumer-controlled, it does not represent a clearly defined class, its claims about whom it represents are inaccurate and overstated, and it has demonstrated that it cannot be trusted to clearly and accurately describe its past role in rate proceedings.

TURN's complaint describes the organization as a

> "... non-profit California corporation ... [which] represents the interests of residential utility consumers generally, as well as specific consumer organizations and constitutencies, such as the statewide Consumer Federation of California, a federation of approximately one hundred organizations; the Consumers Cooperative of Berkeley, with a membership of approximately 90,000 families; San Francisco Consumer Action; the California Legislative Council for Older Americans; the California Gray Panthers and other organizations and individuals."

It is correct that TURN is not a membership organization with voting members who decide its policies. The testimony of TURN's executive director, Sylvia Siegel, illustrated that the organization is funded by donations and some grant funds (as

well as some PURPA awards[5] granted by this Commission). The organization's policy, however, is set by a board of directors which is comprised of representatives from at least five of the consumer organizations mentioned above.

Siegel's testimony made it clear that while there is certainly no uniformity of interests among ratepayers—even among residential ratepayers whom this proposal specifically addresses—there are many positions which TURN takes regarding PG&E that would be shared by substantially all such ratepayers. These include, she testified, a desire to keep rate of return and evaluation of rate base relatively low. As to issues such as rate design and energy conservation subsidies, Siegel testified that TURN takes positions consistent with the policy its board of directors adopts. So, for example, TURN opposed the ZIP and RCS[6] programs in Commission proceedings because TURN took the position that the programs were subsidized by the nonparticipants—primarily low-income, elderly, and renters. Obviously some residential ratepayers liked these programs; however, it must be acknowledged that TURN's position represented the interests of a significant group of such ratepayers.

We are unpersuaded by arguments that TURN's claims about itself are so inaccurate as to cast doubt on its veracity. TURN has demonstrated in its testimony and in past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population. It has also demonstrated that it is a properly constituted nonprofit California corporation, and

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[5]The Commission has adopted rules (see California Administrative Code, Title 20, Section 76.01 et seq.) pursuant to PURPA, the Public Utility Regulatory Act of 1978, which provide for the award of reasonable attorneys' fees, expert witness fees, and other reasonable costs to consumer participants in certain hearings involving electric utilities. In order to be eligible for such award the consumer must demonstrate, among other things, significant financial hardship. TURN has received such awards within the past two years, most recently in D.83-05-048 issued May 18, 1983.

[6]ZIP or Zero Interest Program and RCS or Residential Conservation Service are programs under which the utility made no-interest loans to ratepayers for certain home conservation devices and conducted free energy conservation audits of ratepayers' homes.

that it is presently involved in Commission proceedings involving PG&E. Furthermore, it has adequately demonstrated during this hearing that it cannot participate in all the regulatory proceedings of PG&E it might otherwise participate in without significant financial hardship.

Merits of TURN's Proposals

As noted above, TURN proposes that the extra space in the billing envelope be used in one of three ways. PG&E and CAUS oppose all of TURN's proposals on the grounds that they are unworkable and ill-conceived. Our Legal Division supports TURN's complaint and recommends that we adopt proposal 3. It believes the proposals 1 and 2 would require excessive Commission involvement and that there is insufficient evidence to adopt these proposals at this time.

Before addressing the merit of TURN's proposals, we note that in other decisions we have recognized the value of effective participation by consumer organizations in Commission proceedings. In our UCAN decision, for example, we stated that participation by consumer groups tends to enhance the record in our proceedings and complements the efforts of our Commission staff.

Based on the evidence and arguments presented in this proceeding, we believe that, in general, TURN's proposals are meritorious. Under each proposal, residential ratepayers in PG&E's service territory would be given an opportunity to be informed of and to support advocacy efforts on their behalf through use of the extra space in the billing envelope. We believe that this would be an appropriate and efficient use of the extra space.

With respect to the specific variations offered by TURN, we believe that it would be premature for us to adopt proposals 1 or 2 at this time. These proposals envision a number of qualified consumer organizations participating in the checkoff program. The organizations would be listed on the materials inserted in the envelope, receive monies contributed by ratepayers, and share in program expenses. To date, however,

TURN is the only organization which has sought access to the PG&E billing envelope. Thus, it would be the only organization participating in the checkoff program for an indefinite period of time. Under these circumstances, we believe that the mechanisms outlined in proposals 1 and 2 are neither necessary nor practical at this time.

While we are not adopting proposals 1 or 2 in this proceeding, we are not foreclosing the adoption of similar proposals in the future. Indeed, a checkoff mechanism whereby ratepayers can select among a number of qualified consumer organizations may be both necessary and desirable in situations where more than one organization has sought access to the envelope. We agree with TURN that an essential element of such a mechanism is the development of neutral criteria to determine eligibility.

In this case, we will follow our Legal Division's recommendation and order that proposal 3 be implemented with some modification. We will require PG&E to give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E will be permitted to continue to insert the *Progress* during the remaining months.

In this regard, the fact that the extra space is ratepayer property does not affect the fact that PG&E's ability to communicate with its customers also is or may be a beneficial use of that space. Our goal, as expressed in D.93887, is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E. Implicit in this assumption, of course, is the ongoing availability of PG&E's views. Currently, no controls are placed on the content of the *Progress* and we will not undertake to control the material inserted by TURN.

We will establish certain requirements to ensure that the process works smoothly. First, priority must be given to the billing and legally-mandated notices to customers. If TURN is prevented from inserting its material during any month because

of this priority, it shall be allowed access during another month. This alternate month shall be at TURN's choosing. Otherwise, TURN shall be bound by the schedule discussed below.

Second, TURN shall reimburse PG&E for any costs the company incurs beyond its usual cost of billing that directly result from the addition of TURN's material. Similarly, shareholders should bear costs associated with inserting the *Progress*. We note that currently such costs are not separated from other costs of preparing the billing envelope and are not treated below the line for ratemaking purposes. This practice should cease and all identifiable costs should be assigned to shareholders. We believe that these costs are minimal.

Third, all of TURN's bill insert material should clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.

Fourth, funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E.

Fifth, TURN will be required to establish an adequate mechanism to account for the receipt and disbursal of funds received through the bill insert process.

Sixth, we will require TURN to prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report should describe TURN's efforts on behalf of PG&E's residential ratepayers in the past year. It should also include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers. The first report should be distributed on or before February 1, 1985 and should cover calendar year 1984. A second report should be distributed one year later. Copies of TURN's reports should be filed with this Commission within five days of distribution.

Our order today does not cover every possible contingency. Therefore, in addition to complying with the requirements set forth above, we expect PG&E and TURN to work together in

good faith to overcome problems. If insurmountable problems arise, we may have to issue further clarifying orders. We hope this will not be the case. We want the program to work and we want the parties to make it work.

Actual insertion of TURN's material shall commence 30 days after TURN files a notice with this Commission indicating that an adequate mechanism has been established to account for the receipt and disbursal of all contributions received through the insert process. TURN should describe the mechanism in its notice. The notice should also identify the months over the next two years during which TURN plans to utilize the extra space. Both PG&E and TURN will be bound by this schedule.

Our action today should not be viewed as restricting access to TURN. The adoption of this proposal in no way precludes other proposals from being considered. Should other proposals be brought before us, we will consider the feasibility and benefits of each at that time. If we find that these proposals are meritorious, we could order that extra space be made available for the new program along with any previously authorized ones. Alternately, we could modify today's decision to provide for the implementation of a checkoff program as discussed above. This is consistent with the approach adopted in our UCAN decision.

Constitutionality of Commission Regulating the Use of the Billing Envelope Extra Space

Although we have already stated that the question of who owns the extra space should not be relitigated in this proceeding, we are also mindful that the constitutional arguments which PG&E (and to a lesser extent CAUS) has raised are jurisdictional in nature. Therefore, despite our conviction that the issue was properly determined in D.93887, we address below the constitutional claims made by PG&E. Four such claims were made: that the First Amendment to the United States Constitution prohibits the Commission from regulating envelope use; that the First Amendment prohibits the Commission from requiring PG&E to distribute the message of others; that TURN's proposal violates the equal protection provisions

of both the United States and State constitutions; and that TURN's proposal constitutes an unlawful "taking" of property under the Fifth and Fourteenth Amendments to the United States Constitution.

a. Regulation of Use of the Extra Space by the Commission

The most basic opposition to the Commission's adoption of TURN's proposal is grounded in PG&E's claim that the First Amendment to the United States Constitution deprives us of jurisdiction over the regulation of the use of the billing envelope extra space.

The pivotal cases on this issue are *Consolidated Edison Co. of New York v Public Service Commission of New York* (1980) 447 US 530 *(Con Ed)* and its companion, *Central Hudson Gas & Elec. Corp. v Public Service Commission of New York* (1980) 447 US 557 *(Central Hudson)*. These cases both involved attempts by our analogue in New York, the Public Services Commission (PSC) to prevent utilities from including certain kinds of inserts in its billing envelopes. *Con Ed* involved political advertising in support of nuclear power. *Central Hudson* involved advertising promoting the use of electricity. The U.S. Supreme Court found that each of these types of expression was protected by the First Amendment.

While PG&E claims that the TURN proposal violates all the constitutional standards for First Amendment regulation, we believe that even assuming these tests are applicable, all those standards have been met by the proposal version we adopt here.

1. Time, Place, and Manner Restriction

The court in *Con Ed* specifically held that it had long recognized

"... the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication." 447 US at 535.

The court made it clear that such regulation "may not be based upon either the content or subject matter of speech." 447 US at 536. Assuming for argument that PG&E has some property right in this extra space, the proposal which we adopt here would be a "reasonable time, place, or manner" restriction in that it requires PG&E to share the extra space with TURN. Our order also leaves PG&E with "ample alternative channels for communication." Indeed, PG&E is allowed to use the extra space to communicate to ratepayers two-thirds of the time over the next two years. However, the restriction does not impinge on the content or subject matter of PG&E's messages. Therefore, the proposal as adopted meets this standard.

2. Permissible Subject Matter Regulation

PG&E claims that the TURN proposal requires the Commission to indulge in impermissible subject matter regulation in that it asks the Commission to find that the proposed use of the billing envelope is a better use than PG&E's present use of the billing envelope. In effect, PG&E asserts, TURN is asking the Commission to "evaluate the contents and purpose of its proposed message, versus the contents of PG&E printed materials." (PG&E's Motion to Dismiss, p.16) PG&E mischaracterizes TURN's proposal. The proposal does not require the Commission to look at content at all. It only attempts to respond to our invitation for suggestions on how to use the economic value of the extra space more efficiently for the ratepayers' benefit. To the extent that the proposal as adopted restricts PG&E's use of the extra space, it does so on the ground that the space belongs to the ratepayers, not on the basis of the content. In any case, the proposal as we adopt it is neutral as to content of the parties' messages and, therefore, meets this subject matter standard.

3. Narrowly-tailored Means of Serving a Compelling State Interest

As PG&E asserts, when a party advocates that the State regulate a fundamental right, such as PG&E's First Amendment right to speak, there must be a demonstrable compelling State interest for such regulation. See, for example, *Louisiana v*

NAACP (1961) 366 US 293. 6 Legal Ed 2d 301 cited by PG&E. In that case the Supreme Court in a 5-page decision found unconstitutional two Louisiana statutes, one of which required certain organizations to file annual affidavits that the officers of their foreign affiliates were not members of subversive organizations, and the other of which required the organization to file a list of the names and addresses of all its members and officers in the State. The court held that such governmental regulation violated First Amendment guarantees because it could have the effect of stifling, penalizing, or curbing "the exercise of First Amendment rights", and was thus not narrowly enough drawn to "prevent the supposed evil" it was meant to prevent. (366 US at 297.)

In the present matter a compelling State interest in regulating the use of the extra space has been demonstrated and the TURN proposal as we adopt it does regulate that use in a constitutionally permissible way.

The compelling State interest is one we set forth in our *UCAN* decision:

> "The State interest, of course, is the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." (D.83-04-020 at p.17.)

The fact that we have adopted a shared approach to use of the extra space surely exhibits the "narrowly-tailored means of serving a compelling state interest" that the *Con Ed* court contemplated.

Of course this issue only arises where the governmental entity is restricting some right that the party in question possesses. Here, PG&E claims that the right is the right to speak through unregulated use of the extra billing envelope space. As we have reiterated many times now, since that space is not the property of PG&E in the first place, it has no right to use the space for First Amendment purposes.

Distributing the Message of Another

PG&E cites, among others, the cases of *Wooley v Maynard* (1977) 430 US 705 and *Miami Herald Publishing Co. v Tornillo* (1974) 418 US 241 for the clear proposition that the First Amendment right to free speech also includes the right to refrain from speaking and the right not to be compelled by government to publish that which one does not wish to publish. PG&E contends that each of these rights is breached if we order it to permit access by another to the extra space in its billing envelopes and allow messages of those entities to be carried in that extra space.

This argument, of course, again assumes that we are asking PG&E to publish the messages of TURN or others. In fact, as we explained above, we are simply ordering PG&E, which has physical control over the extra space belonging to the ratepayers to make it available. We are not asking PG&E to publish anything as its own. In fact, in order to protect against the possibility that one receiving a PG&E billing envelope would assume all its contents were generated by the utility, we will require that all of TURN's bill insert material clearly identify TURN as its source and state that their contents are not endorsed by PG&E.

In addition to ordering PG&E to make the space available we are also ordering it to do one thing further, and that is to use its equipment to put the inserts of others into the billing envelope extra space. We do not believe that this act is equivalent to publication. It is merely a requirement clearly within our statutory authority to regulate the practices of the utility. Of course, we will require that TURN pay to PG&E all costs which PG&E incurs beyond its normal billing costs. We have chosen this method of inserting these messages over any other because it appears to be the one which will result in the lowest cost to the ratepayers as well as the least disruption to the utility's billing process.

Distribution of the message here is incidental to the right of the ratepayers to use the extra space. We conclude that these circumstances do not violate the First Amendment protections against being required to publish the statements of others.

Equal Protection

PG&E claims that TURN's proposal violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal protection provision of the California Constitution at Article I, Section 7, because (1) the consumer advocate is given a preferred position vis-a-vis the utility; (2) consumer advocate groups representing residential ratepayers are treated differently from consumer advocate groups representing nonresidential ratepayers; (3) the Commission is forced to draw distinctions, even among residential consumer advocate groups, between those who meet the criteria of technical competence and those who do not (see PG&E's Motion to Dismiss, p.31). PG&E's argument implies that because a fundamental constitutional right is involved—First Amendment freedom of speech—the Commission must show a compelling state interest for discrimination of the sort described. We have already described that state interest above.

We believe TURN's proposal, as we have adopted it, furthers this interest by assuring more complete ratepayer understanding and participation in energy issues involving their utility. Furthermore, the discrimination alleged does not exist. First, the proposal as we are adopting it permits TURN and the utility to share the extra space. Secondly, no other ratepayer organizations have sought access to the extra space. As discussed above, nothing in the proposal as we are adopting it prohibits others from seeking access too.

We therefore perceive no equal protection violations.

Taking of Property

Additionally PG&E propounds the argument that use of the extra space in the billing envelope by others constitutes either a taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution or a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments.

Again, the argument rests on PG&E's continued contention that the entire billing envelope, including the extra space, is its private property. Based on this, PG&E distinguishes the circumstances of its billing envelope from the case of *Pruneyard Shopping Center v Robins* (1980) 447 US 74, 64 L ed 2d 741, which upheld an interpretation of the California Constitution's provisions regarding free expression and petition requiring the owner of a shopping center to permit students to distribute literature and seek support for their petitions. The U.S. Supreme Court found that this interpretation did not amount to a taking under the Fifth or Fourteenth Amendments. PG&E points to the fact that the Supreme Court emphasized that the shopping center differed from other private property in that by choice of its owner it was not limited to the owner's personal use, but was "open to the public to come and go as they please". (Id p.87).

We note, however, that, in context, this observation of the court was used to explain that: "The views expressed by members of the public . . . thus will not likely be identified with those of the owner." (Id p.87.) We are adopting a similar safeguard by requiring that TURN clearly identify its material and state that it has been neither reviewed nor endorsed by PG&E. So, even if the billing envelope were regarded as PG&E's private property, the distinction cited by PG&E is irrelevant.

PG&E also cites the California Supreme Court's decision in *Pacific Telephone and Telegraph Co. v Public Utilities Commission* (1950) 34 C 2d 822 as support for its conclusion that no ratepayer property rights can devolve from ratepayer payment of bill mailing expense. PG&E cites the court's quotation from a 1913 case where it states:

> ". . . And, finally, it may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the

ground that public convenience would be better served thereby . . ." (Id pp.828-829 quoting *Pacific Telephone Etc. Co. v Eshleman* (1913) 166 C 640, 665.)

We think PG&E's reliance on this language is misplaced. The very central point PG&E ignores here is that the extra space is *not* "property held by [PG&E] in ownership". It is an artifact which the ratepayers have paid for and which is extraneous to the provision of a bill.

PG&E also cites *Board of Public Utility Commissioners v New York Telephone Co.* (1926) 271 US 23, 70 L ed 808 for the proposition that ratepayers cannot acquire any interest in the property "used for their convenience". (271 US at 32.) That case, however, had to do with a Commission requiring a utility to set rates at a rate that was conceded to be less than projected costs in order to make up for high returns in a previous year. The court's final statement explains the context in which it discussed ratepayer property rights:

> "The property or money of the company represented by the credit balance in the reserve for depreciation cannot be used to make up the deficiency [between actual return and conceded expense]."

The Supreme Court was clearly not prohibiting ratepayers from having property rights in objects associated with the utility's enterprise, rather it was stating that a Commission could not treat the utility's accounts as if they belonged to the ratepayers who contributed the money to them by paying for service. This concept has no bearing on the one now before us.

Finally, even assuming that the envelope is private property, it must not be forgotten that PG&E is a monoply utility closely regulated by this Commission pursuant to authority derived from this State's constitution. Article XII, Section 4, states:

> "The commission may fix rates, *establish rules*, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." (Emphasis added.)

Section 5 states:

> "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission . . ."

And the Legislature has enacted PU Code Section 701, which states:

> "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

This constitutional and statutory authority provides sufficient basis for a determination by the Commission that PG&E must make the billing envelope available to its ratepayers, or to representatives of those ratepayers.

However, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has in the past *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious.

Findings of Fact

1. This Commission determined in D.93887 as amended that the extra space in PG&E's billing envelopes has economic value, and that the economic value was created by the ratepayers.

2. Quantification of the economic value of the extra space is subjective and imprecise because it is based on many variables.

3. This Commission determined in D.93887 as amended that the 'extra space' in PG&E's billing envelopes belongs to the ratepayers.

4. This Commission determined in D.93887 as amended that PG&E was itself reaping the economic value of the extra space and by such use was depriving the ratepayers of that value.

5. This Commission in D.93887 declined to order PG&E to take any action to remedy the inequity created by its use of the extra space and the deprivation of the value of that space as to the ratepayers because the record was insufficient for the Commission to determine how the Commission could direct PG&E to use the extra space more efficiently for the ratepayers' benefit.

6. In D.93887. this Commission issued an invitation to TURN or any other interested party to file a complaint with the Commission which would expand the record, especially addressing First Amendment problems, so that the Commission might issue an appropriate order to PG&E regarding how it should use the extra space more efficiently for the ratepayers' benefit.

7. By the present complaint TURN complied with the Commission's invitation in D.93887.

8. TURN's complaint lists three alternatives for utilization of the extra space by itself and possibly other residential consumer advocacy organizations.

9. First Amendment issues were addressed by the parties in written briefs and motions filed with the Commission.

10. At the hearing TURN moved to strike questions and answers 5 and 6 and Table 1 of Exhibit 10, the testimony of PG&E's witness, Thomas C. Long. Staff moved to strike questions and answers 7 and 8 of the same witness. The ALJ took the motions under submission.

11. At the hearing TURN objected to the introduction of PG&E's Exhibit 12, a document entitled "Progress: A Readership Study" and also objected to questions and answers 10 through 17 of Exhibit 11. the prepared testimony of PG&E's witness. Gerald W. Sword. on the same subject. The ALJ sustained the objection.

12. PG&E requests that the hearing be reopened to permit receipt of the excluded part of Exhibit 11 and Exhibit 12.

13. At the hearing PG&E moved to dismiss for failure of TURN to allege a violation as required by PU Code Section 1702. The motion was denied by the ALJ.

14. PG&E moved to dismiss for TURN's failure to address First Amendment problems in the complaint itself, claiming that this was required by this Commission's mandate in D.93887.

15. PG&E moved to dismiss for TURN's failure to sign the complaint as required by Rule 4 of the Commission's Rules of Practice and Procedure.

16. CAUS claims this Commission lacks jurisdiction over this matter because PG&E has not "dedicated" the billing envelope space to public use.

17. PG&E and CAUS both claim this Commission lacks jurisdiction over this matter because it would interefere with a proper management prerogative.

18. PG&E argues that this Commisssion is forbidden by the First Amendment from regulating the use of the billing envelope or requiring PG&E to distribute the messages of third parties.

19. PG&E claims that TURN's proposal would violate the equal protection provisions of both the United States and State Constitutions (Fourteenth Amendment and Article I, Section 7, respectively).

20. PG&E claims that TURN's proposal would constitute a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

21. TURN has demonstrated to this Commission an ability to represent a substantial group of ratepayers in Commission proceedings involving the service or rates of PG&E. Further, TURN has demonstrated that it is a properly constituted non-profit California corporation, that it is presently

involved in Commission proceedings involving PG&E and that it cannot participate in all PG&E proceedings it might otherwise participate in without significant financial hardship.

22. Proposals 1 and 2 envision the participation of a number of consumer organizations.

23. To date, TURN is the only organization which has sought access to the PG&E billing envelope.

24. Costs associated with inserting PG&E's *Progress* are not separated from other costs of preparing the billing envelope and are not treated below the line for ratemaking purposes.

Conclusions of Law

1. This Commission's findings on the issue of ownership of the extra space in PG&E's billing envelope in D.93887 as modified should not be relitigated in this proceeding.

2. Findings of Fact 58, 58(a), 59 and 60 of D.93887 as modified should be considered final for the purpose of this proceeding.

3. Objection to the testimony of Thomas C. Long is properly overruled. The testimony should be received.

4. The ALJ's sustaining of the objection to the introduction of all of Exhibit 12 and questions and answers 10 through 17 of Exhibit 11 was proper and the request to reopen should be denied.

5. PG&E's motion to dismiss for failure to allege a violation as required by PU Code Section 1702 was properly denied by the ALJ.

6. The motion to dismiss for failure to address the First Amendment problems in the complaint itself should be denied.

7. The motion to dismiss for failure to sign the complaint as required by Rule 4 of our Rules of Practice and Procedure should be denied.

8. The "dedication" concept does not affect the Commission's jurisdiction over this matter.

9. The Commission's assertion of jurisdiction over this matter does not interfere with a proper managment prerogative.

10. The First Amendment to the United States Constitution does not deprive this Commission of its ability to regulate the usage of the billing envelope or to require PG&E to distribute the messages of third parties.

11. The TURN proposal as implemented by this decision does not violate the equal protection provisions of either the United States or California constitutions.

12. The proposal as implemented by this decision does not constitute a taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

13. TURN's access to PG&E's billing envelope should be contingent on its filing with the Commission notice indicating that an acceptable mechanism has been established to account for receipt and disbursal of all funds obtained through billing envelope solicitation and the months over the next two years TURN plans to insert materials.

14. Proposals 1 and 2 should not be adopted at this time.

15. Proposal 3 should be adopted as modified in this decision.

16. Adoption of proposal 3 as modified should not foreclose the implementation of future meritorious proposals.

ORDER

IT IS ORDERED that:

1. The complete testimony of Thomas C. Long, taken under submission at the hearing subject to legal argument, is received in evidence.

2. The Administrative Law Judge's (ALJ) exclusion of Exhibit 12 and questions and answers 10 through 17 of Exhibit 11 is affirmed and the request to reopen the hearing to receive this evidence is denied.

3. The ALJ's denial of Pacific Gas and Electric Company's (PG&E) motion to dismiss for failure to comply with Public Utilities Code Section 1702 is affirmed.

4. PG&E's motion to dismiss for failure of Toward Utility Rate Normalization (TURN) to address, in the complaint itself, the First Amendment problems is denied.

5. The complaint of TURN is granted to the following extent:

(a) PG&E shall give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E shall be permitted to use the extra space during the remaining months.

(b) PG&E and TURN shall each determine the content of its own material.

(c) Priority shall be given to the billing and legally-mandated notices to customers. If TURN is prevented from inserting its materials during any month because of this priority, it shall be allowed access during another month. This alternate month shall be at TURN's choosing.

(d) Costs of inserting materials in the extra space shall be borne by the sponsor of the materials. PG&E shall bill TURN for all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials. Costs associated with inserting the *Progress* shall be separated from other billing costs and assigned to shareholders.

(e) All of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.

(f) Funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E.

(g) TURN shall establish an adequate mechanism to account for the receipt and disbursal of all funds received through the bill insert process.

(h) TURN shall prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report shall describe TURN's efforts on behalf of residential ratepayers in the past year and include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers. The first report shall be distributed on or before February 1, 1985, and cover calendar year 1984. A second report shall be distributed one year later. An original and 12 copies of TURN's reports shall be filed with the Commission's Docket Office within 5 days of distribution.

(i) Actual insertion of TURN's materials shall commence 30 days after TURN files a notice with this Commission indicating that an adequate mechanism has been established to account for the receipt and disbursal of all funds received through the bill insert process. TURN shall describe the mechanism in the notice. The notice shall also identify the months over the next two years during which TURN plans to access the extra space in the billing envelope. Except for the provisions of subparagraph (c) above, both PG&E and TURN shall be bound by the schedule in this notice.

This order becomes effective 30 days from today.

Dated December 20, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
Commissioners

I dissent in part.

/s/ VICTOR CALVO
Commissioner

I dissent.

/s/ WILLIAM T. BAGLEY
Commissioner

COMMISSIONER VICTOR CALVO, concurring and dissenting in part,

Today's decision represents a significant step towards broader public participation in our proceedings. The use of the extra space in the billing envelope by organizations representing residential ratepayers can only enhance the decision-making process.

Along with my three colleagues, I fully concur that the value of the extra space which remains in the billing envelope ought to inure to the benefit of the ratepayer. Likewise, I fully concur that providing access to the billing envelope to an organization like TURN is desirable. I also anticipate that the same high quality of performance from TURN will prevail in its use of the billing envelope.

Having said this, I feel compelled to dissent in part from the adopted decision. I do so because I have serious reservations about the procedures adopted in the decision rather than the substance of the decision itself.

Specifically, I am troubled by three aspects. First, the decision gives TURN access to the billing envelope four times a year for the next two years. Although TURN is required to file an annual report with the Commission, I would have preferred a procedure which would have established a complete Commission review of the entire experiment after one year. A year's experience would have allowed this Commission to make valuable comparisons of this proposal and the UCAN experiment. At the end of a year's time we would also have been afforded the opportunity for a full review and a complete evaluation of these programs. My concern is that the decision does not formally allow the Commission a realistic opportunity to review the experiment until after a full two years have passed. While I recognize that the Commission may reopen this proceeding at any time, the expectation we have created by this decision is that we should not need to do so until the two years have elapsed. I am not comfortable with this approach.

The second aspect which concerns me is that there is no formal creation of a panel or board to resolve disputes which are likely to arise between TURN, or any other representative group, and PG&E. I would have preferred for our order to have directed PG&E and TURN to establish an arbitration-type panel, perhaps consisting of one member each from PG&E and TURN, and a third member chosen by both. By creating an arbitration panel, there would be an incentive on the part of both parties to tailor the ratepayer-sponsored bill inserts in a manner that would encourage greater accuracy of content and also eliminate controversy, thus better serving the ratepayer.

The last aspect which concerns me is that the decision does not sufficiently emphasize that TURN is not to be given exclusive access to the billing envelope. I strongly believe that any other organization meeting the criteria set forth in our decision should be afforded access equal to that given TURN and that there be specified a precise and relatively simplified method for Commission review and decisionmaking.

For all of the reasons set forth above, I concur and dissent.

/s/ VICTOR CALVO

Victor Calvo
Commissioner

December 20, 1983
San Francisco, California

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Decision 83-12-047

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, *Complainant,* vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, *Defendant.*	**Case 83-05-13 (Filed May 31, 1983)**

DISSENT OF COMMISSIONER WILLIAM T. BAGLEY

December 29, 1983

WILLIAM T. BAGLEY, Commissioner, Dissenting:

The Commission majority would create a ratepayer property right, equitable in nature, in the surplus space (i.e., unused postal weight allowance) of billing envelopes mailed to customers by the Pacific Gas and Electric Company. The Commission's acknowledged premise is that such unused space has economic value (which could be sold) and that such value is contributed to and thus created by the utility ratepayer.[1]

The conclusion in this proceeding, flowing from such premise, is that a single entity representing ratepayers (TURN) is clothed with a property interest in and is thus granted the right to use this "extra space" in four of the monthly billings per year and, by so doing, to preempt and supplant the otherwise constitutionally protected rights of the defendant.[2]

As admirable as the intent may be and as helpful to this Commission and to the ratepayer as the TURN organization is, the majority thus embarks upon a legal journey which reduces itself to an absurdity. Further, basic free speech constitutional rights would be overridden by this question-begging creation of the equitable right in question. In that context, this is a very illiberal decision.

This decision comes complete circle in its rationale and also in its attempt at an evolutionary creation of an equitable-

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[1] *Pacific Gas and Electric Co.* (1981) ___Cal.P.U.C.2d___, Decision (D.) 93887 (as modified by D.82-03-047 issued March 2, 1982), "We think there are or may be many other uses for the 'extra' space. That such space could be sold to public advertisers (without any extra postage costs) at once demonstrates that the space surely has value. That economic 'value' belongs to the ratepayers, who create the space by paying for the envelope and postage." (Mimeo at p. 159b.) See related Findings of Facts 58, 58a, and 59. (Mimeo at pp.220-221.)

[2] "We will require PG&E to give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E will be permitted to continue to insert the *Progress* during the remaining months." Further, "It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views...." (Majority opinion at p.23). It is reasonable to state that this last sentence demonstrates the unconstitutional rationale of the majority opinion. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 538 (62 L.Ed.2d 319, 100 S.Ct. 2326).

type property right. Its ostensible ingenuity is only surpassed by its legal illogic. Seemingly taking a cue from the early English High Court of Chancery and finding no remedy at law (i.e., constitutional and statutory authority), and also finding First and 14th Amendment obstacles, it creates an *in personam* right to speak forthcoming from a "property" right. It thus would obviate all constitutional questions.

This rationale attempts to follow some early equitable principles and at the same time begs the question at issue—whether this Commission has constitutional and statutory powers to order this procedure. This is made evident and obvious by the decision's limited two page (pp. 15, 38) discussion of statutory authority and the extensive discussion of the ostensible equitable right.

That such statutory powers of this Commission are limited is the subject of the recent California Supreme Court decision in *Consumers Lobby Against Monopoly v. Public Utility Commission* (1979) 25 Cal.3d 891 (160 Cal. Rptr. 124, 603 P.2d 41). The Court there commented upon both equitable and statutory (Sections 701 and 728 of the Public Utilities Code) powers. The lead opinion stated that the Commission's statutory powers did not extend to awarding attorneys fees, and that its equitable powers only applied in quasi-judicial reparations cases but not in quasi-legislative ratemaking proceedings. (At pp. 909-910.) "TURN's theory [of public participation costs] cuts far too broadly . . . and and the *consequences of such an interpretation would go far beyond the circumstances presented in this case.*" (Emphasis added). (At p. 911).

That latter quotation of our Supreme Court could not be more appropriate in this instant matter. What is this illusory equitable right which would be created and how far would it extend? Is it a constructive trust based on some type of wrongdoing or mistake or perhaps a resulting trust based upon implied intent? Can there be, in California, any type of trust not based upon statute? (*McCurdy v. Otto* (1903) 140 Cal. 48, 73 P. 748.) Or is it an equitable lien which if not imposed would result in unjust enrichment? (Restatement of Restitution, Section 161.) Perhaps its basis is Henry VIII's Statute of

Uses (1536), the central provision of which according to Maitland was "the declaration that where ever one was seised to the use of another, he who had the use should be deemed to have a legal estate corresponding to the interest he had in the use." (J. Cribbet, C. Johnson, Cases and Materials on Property, (4th Ed. 1978) p.297. But the statute of uses has no application under California law. (*Estate of Fair* (1901) 132 Cal. 523, 60 P. 442.)

Regardless of source, what are "the consequences beyond the circumstances presented in this case"? The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle—to name just a few relevant examples—have "excess space" and "economic advertising value". Some utility corporations place bumper-strip messages on their vehicles. Buses and trucks regularly carry advertising messages. In the words of the majority at page 23 of the decision, "It is reasonable to assume that the ratepayers will benefit from exposure to a variety of views . . . ." Is it the postulate of this Commission, flowing from the decision's stated premise, that any three Commissioners at any time might decide that ratepayers would benefit from exposure to some particular socially desirable message from some ratepayer group making use of any or all such areas of excess valuable space? Could the Gun Owners of California, Inc., headed by a politically-active State Senator, convince three future members of this Commission that it should be allowed to promote wood-cutting and wood burning messages to ratepayers as a fuel conservation aspect of the group's espoused rural ethic? And then use that "excess space" message to raise funds to be used by it on behalf of ratepayers. Similarly, the Sierra Club, by a finding of three Commissioners, after an on-the-record proceeding, could be said to represent the conservation interests of ratepayers in ratemaking cases and thus, also, be allotted some of the excess space for recruiting and fund-raising purposes.

And once established as a right, perhaps ultimately *in rem* rather than in the *ad hoc, in personam* method here established, is the right subject to defeasance? Will there not be writs of mandate entertained to protect this established property right in

the valued excess space? Of interest, see *Sierra Club v. Morton* (1972) 405 U.S. 727 (92 S.Ct. 1361) which affirmed the Circuit Court and held against plaintiff's standing to sue:

> But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so. (At p. 739)

This dissent need not elaborate on the freedom of speech issue which permeates this proceeding. It is sufficient to refer to *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 537 where the Supreme Court states:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

But it should be specially noted that this very same Commission, with three of the present majority sitting and without dissent recently stated in *Frankel v. Pacific Gas and Electric Company* (1982) ____Cal.P.U.C.2d____, D.82-07-009 at mimeo p.3:

> We have ruled that while we may disallow advertising expenses [to be charged to ratepayers] which we will find unreasonable, *we cannot issue gag orders without interfering with a utility's freedom of speech rights.* We adhere to this determination. The U.S. Supreme Court has specifically disapproved advertising prohibitions by regulatory commissions, and has specifically held that the right of free speech extends to corporations. *Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm. of N.Y.* (1980) 447

U.S. 557; *Consolidated Edison Co. v. Pub. Serv. Comm. of N.Y.* (1980) 447 U.S. 530. (Emphasis added.)

The *Frankel* decision responded to a specific complaint asking that this Commission prohibit the Pacific Gas and Electric Company from publishing certain post-storm promotional messages. It should also be noted that the instant decision effectively prohibits the same defendant from bill-mailed free speech messages during four months of the year. Free Speech is allowed for the remaining two-thirds of the billing year.[3] On that very point, and with the same parties before it, this Commission in the immediate predecessor decision to this proceeding said:

> Even more importantly, it is incumbent on TURN to demonstrate whether it is permissible to ban the *Progress* entirely if we simply intend to use that "extra" space for conservation messages, or other speech, composed by the Commission, interested public participants such as TURN or other parties. This might simply be a substitution of one form of speech for another, a preference for governmentally sponsored or governmentally allowed speech. Such a preference could be more dangerous than the evil which TURN seeks to correct. *Pacific Gas and Electric Co.* (1981) ____Cal.P.U.C.2d____, D.93887 mimeo at p.159e.

Much of the above makes reference to the formation and characterization of certain property and equitable rights and may leave the impression that such rights are thought to be static and sterile—that the defendant's physical ownership and possession of property alone should dictate the result. Such intent should not be inferred. To the contrary, it is acknowledged that:

> (A)n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity

[3] "PG&E will be permitted to continue to insert the *Progress* during the remaining months." (Majority opinion at p.23.)

> for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago. The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion. (5 Powell, Real Property (1970) Section 745, pp. 493-495.)

But here we deal with more than just a classical property right defense to some type of governmental aciton or constriction affecting property *per se*. Though certain 14th Amendment property rights have been diluted over the years *vis a vis* an owner's claimed right of usage of the property itself,[4] it is submitted that property rights have never been and should never be eroded, and by judicial fiction transferred to others, in order to justify a governmental constriction on First Amendment principals of free speech. Therein lies a major distinction present in this case.[5]

In the face of these basic constitutional rights, applicable to all, the majority proposes to create an equitable right which it states will, in the name of ratepayer protection, obviate all concerns and supervene all constitutional constraints. Additionally and unavoidably, the majority decision would result in a legal and administrative morass caused by future extensions of the Commisison's decreed property right. Such an exercise is as dangerous as it is unprecedented and unwarranted in the law.

[4] See discussion in *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201 (161 Cal.Rptr. 742, 605 P.2d 381) including references to Civil Code Section 1009 adopted after *Gion-Dietz*. See also discussion in *Agins v. City of Tiburon* (1979) 24 Cal.3d 266 (157 Cal.Rptr. 372, 598 P.2d 25).

[5] See *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 540, "But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests in a government in overseeing the use of its property."

If further citation is desired for the proposition that no such right exists, see *Fields v. Michael* (1949) 91 Cal.App.2d 443, (205 P.2d 402).[6]

/s/ WILLIAM T. BAGLEY
William T. Bagley
Commissioner

[6] "That no direct authority upon it has been produced must be due alone to the fact that legal evolution had not progressed far enough to develop a needless precedent for a necessary conclusion." 91 Cal.App.2d at p.451.

APPENDIX B

Decision 84 05 039 May 2, 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, *Complainant,* vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, *Defendant.*	**Case 83-05-13 (Filed May 31, 1983)**

ORDER MODIFYING DECISION (D.) 83-12-047 AND DENYING REHEARING THEREOF

Applications for rehearing of D.83-12-047 have been filed by Pacific Gas & Electric Company (PG&E), California Association of Utility Shareholders (CAUS), California Public Interest Research Group (Cal PIRG), and a group of PG&E shareholders (Hannon). An amicus curiae brief in support of PG&E's application was filed by Pacific Legal Foundation (PLF). Toward Utility Rate Normalization (TURN) has filed a response to the various applications, asking that rehearing be denied. PG&E has filed a motion to strike that response as untimely and TURN has responded to that motion asking that it be denied and stricken in part. Such motions are inappropriate and will be denied.

On March 7, 1984, by D.84-03-045, we stayed D.83-12-047 until further order of this Commission so that we might consider the merits of these filings.

We have carefully considered all the allegations of legal error and the responses thereto and are of the opinion that good cause for granting rehearing of D.83-12-047 has not been shown. However, D.83-12-047 should be modified to correct errors and to clarify our intentions. Therefore,

IT IS ORDERED that:

1. D.83-12-047 is modified as follows:

(a) The following discussion is added following page 7, mimeo.:

"While our previous decisions on this subject have concluded that the extra space is the property of ratepayers, we should point out that our jurisdiction over the extra space does not depend solely or entirely on a determination of the ownership of the extra space or the exact nature of a property right in such space.

"The extra space in the billing envelope is a byproduct of an activity essential to the operation of the regulated utility—billing. Since billing is an essential and proper function of a regulated utility, this Commission has allowed the utility to recover its reasonable expenses—postage, materials, labor, overhead—from ratepayers. The existence of the extra space is a direct consequence of the act of billing for utility services and the way in which postal costs are assessed.

"Because the billing space is so inextricably related to activities subject to routine regulation, we have repeatedly exercised our authority under the State Constitution and Public Utilities Code Section 701 to permit and require the space to be used for the benefit of ratepayers. The billing space has frequently been put to the obvious use of communicating with ratepayers. Recently, we have also solicited proposals that would allow ratepayers to benefit from the economic value of the extra space. (D.93887)

"Use of the billing space to accomplish various informative functions for the benefit of ratepayers now occurs so frequently that it had become a routine matter. Notices of applications for rate increases and notices of public hearings are regularly inserted without objection in billing envelopes (see, Resolution ALJ-149, October 20, 1982, p. 3.)—so routinely, in fact, that we have referred to extra space as being that space which is available *after* legal notices and, of course, the bills and return envelopes have been included. These notices have been included in billings precisely because the billing envelope is such an effective method of communicating with ratepayers. We have also required utilities to include notices of the availability of various energy conservation programs (D.92653) and conservation information (D.89316). We have required our utilities to include an insert informing ratepayers of the effects of a complicated federal tax law (D.93887). And most recently, we have used the billing space of telephone utilities to notify customers of a new lifeline program designed to assist low-income people to remain on the telephone system in the wake of the divestiture of AT&T. (D.84-04-053.) All of these are examples of the proper use of a valuable means of communication that the extra space provides.

"We have also permitted the utilities to use this extra space to communicate with ratepayers. Subject to our general oversight (e.g. P.U. Code Section 453 (c), (d)), utilities have used this space to inform customers of ways to reduce energy consumption, of the availability of special programs, of how to resolve problems with the utility's service, and of other topics. When a utility has used the extra space to engage in political advertising, we expressed our concern that ratepayers should not be required to bear any portion of the direct or indirect expense connected with such advertising. (D.93887.)

"Other uses of the extra space are certainly possible. TURN has presented evidence in an earlier case that a utility in another state has sold the extra space for commercial advertising unrelated the utility's business and used the resulting revenues to reduce rates to customers.

"Viewed in this general context, it appears to us that the issue raised by TURN's complaint is *not* whether the Commission may exert its authority over the billing space. As the previously stated examples demonstrate, the Commission has repeatedly, and we think properly, required the billing space to be used for the benefit of ratepayers. As we mentioned previously, this power has been exercised so routinely that we have defined "extra space" as excluding the space occupied by notices required by the Commission. The question raised by TURN's complaint, then, is whether TURN has presented a proposal for use of the billing space that is sufficiently beneficial to ratepayers for us to order implementation of the proposal. See, D.93887, mimeo, p. 157g, as modified. For reasons discussed in this decision, we are persuaded that TURN had presented such a proposal."

(b) On page 13, mimeo., the last sentence is modified to read:

"The fact that in hindsight these amounts did not precisely reflect PG&E's actual expenditures for postage during certain periods of time does not justify treating the extra billing envelope space as the property of the utility rather than of the ratepayers."

(c) On page 13, mimeo., at the end of the last paragraph, a sentence is added to read:

"Nor does this fact change our conclusion regarding this Commission's power to regulate the billing space as part of our overall regulatory authority."

(d) On page 17, mimeo., the last sentence is modified to read:

"Such Commission action is certainly within the ambit of our statutory authority and consistent with our normal regulation of the billing process."

(e) On page 18, mimeo., the third sentence in the first paragraph is modified to read:

"Whatever validity this argument still may have (see *General Telephone Co. v. P.U.C.* (1983) 34 Cal.3d 817), it does not pertain to property not belonging to the utility."

(f) On page 18, mimeo., the last sentence in the first paragraph and Footnote 4 are deleted.

(g) On page 22, mimeo., the first complete paragraph is modified to read:

"Before addressing the merit of TURN's proposals, we note that in other decisions we have recognized the value of effective participation by consumer organizations in Commission proceedings. Further, in our UCAN decision, we specifically recognized how space in a utility billing envelope could be used to allow a consumer organization to communicate with the ratepaying public and solicit voluntary contributions to support ratepayer participation. We stated:

"There is no question that participation by representatives of consumer groups tends to enhance the record in our proceedings. The California Supreme Court reminded us of that in deciding *Consumers' Lobby Against Monopolies (CLAM) v. Public Utilities Commission* (1979) 25 C 3d 891 which found that the Commission has jurisdiction to award attorneys' fees and costs to consumer representatives under certain circumstances. In reaching this conclusion, the Court noted:

"[T]he staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing

(Pub. Util. Code Section 1731) or judicial review (Id., Section 1756) of Commission decisions." (25 C 3d 891, 908.)

We hasten to add that our staff is a dedicated, professional, highly competent one. The observation of the Court merely points out an inevitable facet of the unique position of our staff. There can be no denying that the principal representative of the residential and small business ratepayer is in fact the staff, whose job it is to challenge a utility's showing and, recommend the minimum rates necessary to ensure adequate service and provide a reasonable return to the utility. The staff, however, may not pursue appeals. Thus, if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in our proceedings . . . .

Furthermore, while we believe that the opportunities for compensation for participation in our proceedings help assure the development of a full and fair record, we recognize the merit of the Center and Simmons' contention that such opportunity may seem illusory to an individual ratepayer. What the complainants propose is another alternative, which relies neither upon increased funding through rates nor necessarily upon compensation under one of our present procedures. It appears that there are many ratepayers in SDG&E's service area who would relish the opportunity of belonging to an organization which could afford to hire people with technical expertise to represent their particular interests in proceedings as technical as most of our major cases are. In fact, many of these ratepayers have written to us to express their support of this UCAN proposal." D.83-04-020, mimeo., pages 7-8."

(h) On page 23, mimeo., Footnote 6 is added at the end of the first paragraph to read:

"We note that in C.83-08-04 and C.83-12-03 several consumer groups including TURN are seeking access

to space in the Pacific Bell envelope. The checkoff mechanisms are among the proposals now under consideration in those proceedings."

(i) On page 23, mimeo., the last sentence in the second paragraph is modified to read:

"PG&E will be permitted to continue to insert the *Progress* during the remaining eight months and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted."

(j) On page 28, mimeo., the second sentence in the first paragraph is modified to read:

"Assuming for argument that PG&E has some property right in this extra space, the proposal which we adopt here would be a "reasonable time, place, or manner" restriction in that it requires PG&E to share the extra space with TURN for a purpose which significantly benefits ratepayers."

(k) On page 28, mimeo., the sixth sentence in the last paragraph is modified to read:

"To the extent that the proposal as adopted restricts PG&E's use of the extra space, it does so on the grounds that the space belongs to the ratepayers and that this restriction is made pursuant to our overall regulatory authority, not on the basis of content."

(l) On page 30, mimeo., the second sentence in the first complete paragraph is modified to read:

"Here, PG&E claims that the right is the right to speak through unregulated and exclusive use of the extra billing envelope space."

(m) On page 30, mimeo., the second sentence in the last paragraph is modified to read:

"In fact, as we explained above, we are simply ordering PG&E, which has physical control over the billing space, to make it available for the benefit of ratepayers."

(n) On page 34, mimeo., the last sentence in the first paragraph is modified to read:

"As discussed above, the extra space is a byproduct of the billing process which is paid for by ratepayers."

(o) The following paragraph is added to page 34:

"In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious."

(p) On page 35, mimeo., the first sentence is modified to read:

"Finally even assuming that the extra space is PG&E's property, it must not be forgotten that PG&E is a monopoly utility closely regulated by this Commission pursuant to authority derived from the State's Constitution."

(q) On page 35, mimeo., in the fifth line of the first paragraph, delete the numeral "4" and insert the numeral "6".

(r) On page 35, the last sentence is modified to read:

"This constitutional and statutory authority provides sufficient basis for a determination by the Commission that PG&E must make the billing space available to its ratepayers, or to representatives of those ratepayers."

(s) The first paragraph on page 36, mimeo., is deleted.

(t) The following Findings of Fact are added on page 39, mimeo., to read:

"25. The extra space in the billing envelope is a direct consequence of the utility billing process and the way postal costs are assessed.

"26. The billing space is inextricably related to routine utility activity.

"27. This Commission has allowed utilities to recover all reasonable billing expenses from ratepayers.

"28. This Commission has required and permitted utilities to use the billing space as a communications medium for the benefit of ratepayers.

"29. Participation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff.

"30. TURN's proposal will help assure the fullest possible participation in our proceedings."

(u) On page 39, mimeo., a Conclusion of Law 7A is added to read:

"Under the State Constitution and Public Utilities Code, this Commission has the authority to regulate the billing process and to ensure that billing space is used for the benefit of utility ratepayers."

(v) On page 41, mimeo., Ordering Paragraph 5(a) is modified to read:

"PG&E shall give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E shall be permitted to use the extra space during the remaining eight months and may also make use of any extra space not used by TURN during the months TURN's material is inserted."

2. PG&E's motion to strike TURN's response to the applications for rehearing is denied.

3. TURN's motion to strike a portion of PG&E's motion is denied.

4. Rehearing of D.83-12-047 as modified herein is denied.

5. The stay of D.83-12-047 is extended until further action of this Commission.

This order is effective today.

Dated May 2, 1984, at San Francisco, California.

I will file a written dissent.

VICTOR CALVO
Commissioner

I will file a written dissent.

WILLIAM T. BAGLEY
Commissioner

LEONARD M. GRIMES, JR.
President

PRISCILLA C. GREW
DONALD VIAL
Commissioners

COMMISSIONER VICTOR CALVO, Dissenting.

This Commission has done much during its history to ensure full and fair public participation in matters heard before it. Our liberal rules of standing, procedure and evidence are a testament to that history. Today, the majority attempts to expand public participation by permitting Toward Utility Rate Normalization (TURN), a respected and frequent intervenor in our proceedings, to directly solicit interest and funding from the ratepayers of Pacific Gas and Electric Company (PG&E) through the use of the extra space in the billing envelope PG&E sends to its ratepayers. I laud the effort, but for the reasons set forth below, I cannot support it.

The "extra" space in the PG&E billing is really not a "property" but is something of an accident. Relevant postage rates, being based on one ounce increments, are indifferent to whether a mailer uses one-quarter of that ounce, three-quarters of it, or the full ounce. The mailer pays for the fraction as if it were the whole. The monthly bill and the return envelope PG&E sends to its customers normally weighs not the full ounce but a fraction of it. So the question arises, what to do with the difference, the "extra" space?

PG&E currently uses this extra space to send its *Progress*, a shareholder-funded newsletter which, while pleasant and sometimes informative, is nonessential to the provision of safe and reliable utility services. TURN now asks that as a consumer organization it be permitted to periodically use the extra space to reach ratepayers who, if properly informed, might see fit to morally and/or financially support its efforts. In today's order, the majority reaffirms its earlier decision to grant TURN's request. I must dissent from this order. Some of my concerns were expressed in my earlier separate concurring opinion in this matter in which I dissented in part. I will reiterate them here and, having had time to further reflect on this matter, present additional concerns which now lead me to fully dissent from the majority opinion.

In reviewing this case, I was struck by the similarities between it and the case of *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), wherein the Supreme Court

struck down a state statute which required newspapers to provide political candidates whom they had criticized an opportunity to respond to the criticism. Similar to the Court's concerns in that case, it is not altogether clear to me that TURN's use of the billing envelope to disseminate its literature is required as a matter of either necessity or right. Thus, I am persuaded that we should not infringe on PG&E's rights of free speech guaranteed to it by the First Amendment.

TURN has other opportunities to reach its natural audience. It may solicit support through its own mailings. Additionally, our rules regarding intervenor fees are frequently used to reward TURN's good efforts and, in fact, in another action today we award TURN $13,102 in attorney's fees for its contribution in a Commission rate case proceeding. I question, therefore, if TURN or any other party *needs* access to the billing envelope in order to be an effective participant in our proceedings. As to rights, TURN certainly cannot lay claim to any greater rights than any other ratepayer or consumer group that might request access to the billing envelope. Thus, I am concerned that this Commission not place itself in a predicament where it will be called upon to resolve disputes as to whom or when or how often a multitude of competing groups or ratepayers should be granted access to the billing envelope. And, of course, the Supreme Court has implied that some rights are held by the utility should it desire to use the extra space for its purposes. *Consolidated Edison Co. v. Public Service Commission of New York,* 447 U.S. 530 (1980).

As to the practical shortcomings of this order, I noted in my separate opinion to Decision 83-12-047 that it is incumbent upon the majority to specify a precise and relatively simple method to resolve these sorts of disputes. Yet once again that necessity has been avoided by the majority. Also, in my opinion, granting TURN access to the PG&E billing envelope on eight occasions (four times per year for two years) is undue. A meaningful evaluation could take place with respect to a program of this nature within a year, yet the majority grants TURN use of the billing envelope for two full years. I have found both TURN and PG&E to be vigorous advocates and

constant adversaries and I would not look forward to resolving additional unnecessary confrontations between them.

I point out here that I found my concerns to be less compelling and urgent in Decision 83-04-020, *Center for Public Interest Law, et al.* v. *San Diego Gas and Electric Company.* The "UCAN" organization of that case is a ratepayer founded and comprised group with closer links to its constituency than is the case with TURN. That case was also void of the internecine rivalries between consumer groups with which I am concerned, a rivalry manifested in this case by the presence of the California Public Interest Research Group.

The Legislature has often expressed interest in the issue of public participation in Commission proceedings. Proposals for a consumer utility board comprised of ratepayers have been introduced by various legislators. I would be more inclined to support the majority if some express statutory provision addressed the request now before us. Instead, the majority essentially relies upon implicit authorities found in Public Utilities Code Section 701. I am not wholly convinced by their arguments. But, assuming that the majority is correct, having the authority to do something and deciding whether or when to exercise it are two separate questions. In this case and again assuming we have authority in this matter, I would not exercise our jurisdiction. Therefore, I must respectfully dissent.

/s/ VICTOR CALVO

Victor Calvo
Commissioner

WILLIAM T. BAGLEY, Commissioner, Dissenting:

This is written to reiterate and emphasize one aspect of my prior dissent in this matter (see D.83-12-047, Dissent of W.T. Bagley). That dissent is attached hereto, incorporated by reference, and is made a part of this dissent to the final order issued by the Commission majority today. After acknowledging an understandable societal dilution of property rights over the years, that dissent stated at page 7:

> But here we deal with more than just a classical property right defense to some type of governmental action or constriction affecting property *per se*. Though certain 14th Amendment property rights have been diluted over the years *vis a vis* an owner's claimed right of usage of the property itself, it is submitted that property rights have never been and should never be eroded, and by judicial fiction transferrred to others, in order to justify a governmental constriction on First Amendment principals of free speech. Therein lies a major distinction present in this case.

To restate this basic distinction, it is submitted that there is absolutely no precedent for, or constitutional basis of, a dilution and transfer of a person's property right in order to justify a restriction upon that person's right of free speech. Where a claimed property or governmental right conflicts with the First Amendment, the First Amendment prevails.

Conscious of the fact that the theory of an "equitable property right" in the envelope is illusory at best, the Commission majority now searches for an additional ground or rationale for its decision. The majority would now, additionally, rely upon an omnibus powers section of the Public Utilities Code.[1]

[1] "The Commission may supervise and regulate every public utility in the State and may do all things whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (Section 701).

The majority also would amend a statement made in a most objectionable footnote to the original opinion and order, by adding the thought that defendant PG&E "may use any of the extra space not used by TURN. . .".[2]

Indulging in further contortions, the majority now adds the following paragraph to its original decision at page 34:

> "In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious."

That last postulate immediately brings to mind the very recent U.S. Supreme Court decision, reversing the California Supreme Court, and saying that if there were a public trust to be imposed on the subject privately held lagoon, it should have been asserted during its inceptive years and not 130 years later. *Summa Corp.* v. *California Ex Rel. State Lands Commission et al.* 52 LW 4433 (April 17, 1984).

Putting that apt analogy aside, the basic fact remains that the shareholder's right, exercised at shareholder's expense, to use the company's envelope for a First Amendment-protected message is being curbed and transferred to others.

And now under the revised order TURN can determine, solely by its choice of paper weight, whether or not and if so how much material may be inserted in the envelope by defendant's management on behalf of the shareholder. See footnote 2, *supra*. Under this order we have the unseemly

[2] See page 23 of the original opinion: "It is reasonable to assume that ratepayers will benefit more from exposure to a variety of views—we will require PG&E to give TURN access to the extra space in the billing envelope four times a year—PG&E will be permitted to continue to insert the Progress during the remaining months".

This is now modified by adding: "*and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted.*" (Emphasis added).

situation where government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other. That, compared to government proscription, is deprivation squared.

It is of one genre to limit, for example, the size and nature of improvements on ocean and bay front property in order to preserve public view and enjoyment of our natural resources; it is quite another to order such property owner to organize public meetings on his or her view property (four times a year) for the benefit of extraneous interests and to *forbid* that owner from speaking at such gatherings if the other interests object. Literally, the free speech forum—the podium if you will—is being transferred from one party to another by this governmental decision.

The majority's basic problem is that it refuses to recognize that corporate entities are granted and continue to enjoy First Amendment rights. That is exemplified by its facade-like transfer of ownership of the forum, and likewise by its new reliance on Section 701. Just because the legislature grants to the PUC a broad set of powers over public utilities does not make those utilities any less the beneficiaries of First Amendment protections and does not make deprivation of speech rights anymore constitutional.

It is not inordinate to assume that government at some future time would assert additional authority over the newspaper industry, and the many corporate owners thereof. Gasoline rationing was a fact of life not too many years ago. Conceivably there may come a day when we would face the necessity of paper or newsprint rationing in a monopolized, short supply industry. Congress could, constitutionally, declare suppliers and even a limited number of distributors to be "Public Utilities". But neither Congress nor the Legislature—nor the designated regulatory body—could instruct the corporate newspaper owner to use or not use fuel in pursuit of a given story, nor could the newspaper supplier be ordered to limit its sales to certain desirable news usages, even though those suppliers were legally denominated "monopoly public utilities" and placed under a statute comparable to Section 701.

In its verve to support "consumer rights", this majority has run rough-shod over basic constitutional rights of free speech—and without giving thought to logical extensions of its act. Would it extend its free speech constructions to other corporate entities which might be regulated in the future just because they are regulated. And who, after TURN gets its chance, will next be able to control this defendant's right to speak. In the context of the First Amendment, this is a very illiberal decision by a majority who would seek to liberalize consumer rights at the expense of the right of Free Speech. I would remind the majority that in the past other seeming Democratic societies, on a larger scale, have followed a similar path. They are no longer Democratic societies.

/s/ WILLIAM T. BAGLEY
William T. Bagley
Commissioner

May 2, 1984
San Francisco, California

Decision 84-03-045

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

TOWARD UTILITY RATE NORMALIZATION a non-profit California corporation; *Complainant,* vs. PACIFIC GAS AND ELECTRIC COMPANY, a corporation, *Defendant.*	Case No. 83-05-13

ORDER EXTENDING STAY OF DECISION 83-12-047

Petitions for rehearing of D.83-12-047 have been filed by Pacific Gas & Electric Company, California Association of Utility Shareholders, California Public Interest Research Group, and jointly by J. S. Hannon and B. R. Worthington, custodians, and J. K. Murphy. A stay of D.83-12-047 is in effect in accordance with Public Utilities Code Section 1733. The merits of the petition are still under consideration. We will respond to the petition when our review has been completed.

In the interim,

IT IS HEREBY ORDERED that the stay of D.83-12-047 shall remain in effect until further order of this Commission.

This order is effective today.

Dated March 7, 1984, at San Francisco, California.

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

Commissioner Leonard M. Grimes, Jr. being necessarily absent, did not participate.

APPENDIX D

Relevant Parts of Decision No. 93887 Are Printed As Follows:

Decision 93887 December 30, 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND ELECTRIC COMPANY for authority, among other things, to increase its rates and charges for electric and gas service. *(Electric and Gas)*	Application 60153 (Filed December 23, 1980)
Application of PACIFIC GAS AND ELECTRIC COMPANY for authority, among other things, to increase its rates and charges for electric service. *(Electric)*	Application 58545 (Filed December 26, 1978)
Application of PACIFIC GAS AND ELECTRIC COMPANY for authority, among other things, to increase its rates and charges for gas service. *(Gas)*	Application 58546 (Filed December 26, 1978)

B. Miscellaneous

1. PURPA

TURN presented witness R. Spertus to testify on whether the Commission is bound by the advertising standards set forth in Title I, Section 113(b) (5) and Section 115(h) of PURPA; whether PG&E has violated such standards by its placing of political printed matters in its customer bill or dividend envelopes; and, if affirmative, what lawful remedies should be ordered by the Commission.

Witness Spertus alleges that PG&E has violated the following sections of PURPA by placing certain printed matter into the customer bill or shareholders dividend envelopes:

> *"Title I, section 113 (b) (5)*
>
> "Advertising—No electric utility may recover from any person other than the shareholder (or other owners) of such utility any *direct or indirect* expenditure by such utility for promotional or *political* advertising as defined in section 115 (h).
>
> *"Title I, section 115 (h) (selections):*
>
> "(A) The term 'advertising' means the commercial use, by an electric utility, of any media, including newspaper, *printed matter,* radio, and television in order to transmit a message to a *substantial number of members of the public or to such utility's electric consumers.*
>
> "(B) The term 'political advertising' means any advertising for the purposes of influencing public opinion with respect to legislative, *administrative,* or with respect to *any controversial issue of public importance.*" (Emphasis added.)

Spertus states that the cost of distributing these messages would be considerably higher to PG&E if it did not pick up a free ride by using the bill and dividend envelopes. He further testified by including the PG&E Progress in such mailing, it deprives sale and usage of such space to other advertisers. The political advertising themes that Spertus refers to are the need for prompt licensing of Diablo, the need to take Canadian gas,

the need for improvement in PG&E's regulatory treatment in order to ensure future electric supplies. He recommends that the Commission disallow PG&E the mailing costs for its customers monthly bills and shareholders dividends because they are direct or indirect expenditures for political advertising and further to institute a mechanism for physical production of bill inserts and for the writing and editing of the information contained in them.

PG&E argues that TURN's witness is in error in that this Commission did not adopt the PURPA advertising standards. PG&E states that the Commission, in considering whether it should adopt the PURPA standards, reported to the Department of Energy (DOE) that by Public Utilities (PU) Code Section 796 and adoption of the use of FPC Account 426.4 of the Uniform System of Accounts for Public Utilities and Licenses, it complies with the PURPA standard on advertising. PG&E argues that the California code provisions, unlike PURPA, do not include, as political advertising, the discussion of controversial issues of public importance. PG&E further argues that even if the Commission had adopted PURPA definitions of political advertising, there would be no violation since PG&E's stockholders pay for the cost of the PG&E *Progress* and shareholders letters, and there is no prohibition against use of billing or dividend envelopes to distribute such material. PG&E further argues that virtually every example of alleged political advertising in the PG&E *Progress* fits within one of the exceptions in PURPA, Section 115 (h) (2) and that the remedies proposed by Spertus were unsupported and in some cases unconstitutional.

We are persuaded that TURN's arguments have solid conceptual merit. However, for the reasons which follow, we decline to implement at this time the access mechanisms which TURN proposes. We also shall not bar PG&E from continuing to mail out the *Progress* in the billing and dividend envelopes. We do not rule out the possibility of such action in the future, however.

Our analysis begins with the question of whether this Commission adopted a PURPA standard barring the utility

from recouping from ratepayers costs associated with political advertising. In its November 8, 1980 PURPA compliance filing with the Department of Energy, the Commission addressed the question, "Does the Advertising Standard that you had adopted require . . . [d]efinitions of political and promotional advertising which conform with those given in section 115 (h) (1) and (2) or 304 (b) (1) and (2) of PURPA?" The Commission's answer was "Yes." We feel it is clear that this Commission has adopted the prohibition on the recoupment by utilities of political advertising expenditures from ratepayers.

We next must ask whether PG&E engages in political advertising in the *Progress*. It is clear that, from time to time, PG&E does engage in such advertising. We need only look at the July, 1981, *Progress* which TURN appended to its brief. The editorial there contained a lengthy critique of the so-called "off gas" requirement mandated by Congress in the 1978 Powerplant and Industrial Fuel Use Act (PIFUA). The editorial was obviously comment "for the purpose of influencing public opinion with respect to legislative . . . or . . . controversial issues of public importance," since it came at a time when Congress was considering amendments to PIFUA in conjunction with tax and budget matters. (We note Congress did in fact vote to terminate the off gas requirement for utilities.) We have to state, candidly, that we think PG&E's position on this issue was correct. The editorial even contained remarks of the Commission's President pointing out the expense associated with the off gas requirement. But our agreement with PG&E on such an issue does not blind us to the fact that, from time to time, the *Progress* contains political comment on important and controversial issues of public policy. If we are to adhere to the standards which Congress has set out for us in PURPA, we must recognize political speech for what it is and act to ensure that ratepayers do not help the utility, directly or indirectly, meet the costs of mailing or distributing such speech.

It is frequently stated by PG&E that the ratepayers face no extra cost because of the *Progress*. It is stated that shareholders pay for the entire cost of composing and printing the *Progress*. We acknowledge this is true. PG&E claims it merely inserts the *Progress* into the unused "extra" space in the billing or dividend

envelope and does not cause any extra postage costs. (Postage is paid for, as is the case with envelopes, by ratepayers.) We acknowledge that no extra envelope or postage costs are incurred. The fallacy in PG&E's position, however, is its implicit claim that there is no other use to which the "extra" space may be put.[1] We think there are or may be many other uses for the "extra" space. That such space could be sold to public advertisers (without any extra postage cost) at once demonstrates that the space surely has economic value.[2] That economic "value" belongs to the ratepayers, who create the space by paying for the envelope and postage. Use of the space for the *Progress* instead of some other purposes deprives the ratepayers of that "value," which they own. Since PG&E captures that "value" without charge, it is recovering a cost from the ratepayers. We believe such recovery is forbidden under PURPA.

We shall explain further our view that there are other uses to which the "extra" space may be put, in order to show that there definitely is a cost which ratepayers are forced to bear when the *Progress* is mailed with the customer bill. TURN introduced into the record remarks made by PG&E's Manager of Energy Conservation and Services at the Commonwealth Club on April 27, 1981:

> "When it comes to marketing communications the seemingly unexciting medium of our bill offers a surprising amount of pull. Take the case of our furnace filter promotion. We had planned to run a bill insert promoting a 50 cents off coupon for furnace filter replacements. However, the CPUC preempted the bill insert with a legal notice and we had to resort to newspaper advertising to promote the certificate. Spending about $150,000 we managed to get 29,000 redeemed. Six months later when

---

[1] We define such "extra" space as the space remaining in the billing or dividend envelope, after inclusion of the monthly bill, dividend check and/or required legal notices, for inclusion of other materials up to such total envelope weight as will not result in any additional postage cost. The "extra" space is the space which the *Progress* now occupies.

[2] TURN alleges the "extra" space in Kansas Gas and Electric billing envelopes is now being sold, without objection by the public, to commercial advertisers as a means of raising revenue to offset the utility's revenue requirement.

time came to change the filters again we ran the bill insert for $7,000 and got 23,000 coupons redeemed. So obviously the bill insert is the way to go."

These remarks illustrate perfectly the "opportunity cost" that the *Progress* causes ratepayers to bear. PG&E's management obviously chose to mail the *Progress* and the legal notice, rather than the legal notice and the useful furnace filter replacement promotion. As a result, ratepayers were forced to bear the costs of inefficient use of the billing envelope. Use of the "extra" space for the *Progress* deprived ratepayers of all the savings inherent in conservation, i.e., in the utility's selling less gas due to more efficient furnace operation.

PG&E would at the very least have to pay fourth class bulk mail rates for the Progress if it did not mail it with the customer bill. It is this cost which PG&E improperly recovers, albeit indirectly, from ratepayers, who are deprived of the value which their expenditures (for postage and envelopes) have created. It is not content that we are concerned with. The significant point to remember is that we have no way of knowing how many times in the past PG&E was (or how many times in the future it would be) forced, due to inclusion of the *Progress* to defer a more efficient use of the "extra" space in the billing envelope which would have saved (or earned) money for ratepayers.

The same analysis, however, cannot be applied to PG&E's practice of mailing the *Progress* in dividend envelopes. Although it might be said that ratepayers technically "own" the "extra" space in the dividend envelope, it cannot be said that *economic* (as opposed to political or propagandistic) "value" is being lost to ratepayers as a result of inclusion of the *Progress* in that space. While it is certainly conceivable that the "extra" space in the billing envelope could be sold to would be advertisers, we are not aware of corporations selling space in their dividend envelopes to would be advertisers. By contrast, the normal and customary practice is for corporate management to communicate with shareholders when dividends are distributed. This inures to ratepayers' benefit, at least in part, because it allows for capital to be raised privately, without ratepayers having to put capital up front for utility operations.

We cannot see any real "opportunity cost" associated with mailing the *Progress* in the dividend envelopes.

Having come this far in our analysis, we next must ask what steps we should take to bar PG&E from recovering from ratepayers a cost of its political advertising or, alternatively stated, what steps we should take to utilize most efficiently for the ratepayers' benefit the "extra" space occupied by the *Progress* in the billing envelope. We see a number of possibilities and a host of problems for each possibility.

One possible solution is to ban the *Progress* entirely. We are inclined to believe that such action is constitutionally permissible as a proper "time, place and manner" restriction on speech that would be allowed under *Consolidated Edison Co. v. Public Service Commission* (1980) 447 U.S. 530. There the high court stated the well established principle that the government may impose time, place and manner restrictions on the exercise of speech where such restrictions "serve a significant governmental interest and leave ample alternative channels for communication. [Citations.]" (*Id.* at p. 535.) The significant governmental interest to be served by an *across the board* ban on the *Progress* in billing envelopes is the interest identified by Congress in PURPA, namely, saving ratepayers from having to bear the cost, directly or indirectly, of utility political advertising. As demonstrated above, that cost is real and, although as yet unquantified, potentially enormous, whether viewed as the "opportunity cost" of foregone revenue or otherwise. We also believe there are ample alternative means by which PG&E may broadcast or distribute its views to the public.

But we have to ask if such a ban would ultimately be in the ratepayers' best interest. As it is now, PG&E's *Progress* does contain from time to time useful information about conservation programs, cost saving measures, Commission action and the like. The cost of composing and printing such information is borne by shareholders. Such benefit to ratepayers must be weighed against the "opportunity cost" borne by ratepayers. It is unclear at present how that balance should be struck.

Even more importantly, it is incumbent on TURN to demonstrate whether it is permissible to ban the *Progress*

entirely if we simply intend to use that "extra" space for conservation messages, or other speech, composed by the Commission, interested public participants such as TURN or other parties. This might simply be a substitution of one form of speech for another, a preference for governmentally sponsored or governmentally allowed speech. Such a preference could be more dangerous than the evil which TURN seeks to correct. We believe it might be invalidated for the reasons the content-based regulation (a ban on pro-nuclear speech) was invalidated in *Consolidated Edison.* This is a problem to which parties like TURN must devote greater attention if we are to arrive at a permissible means of more efficiently using the "extra" space in billing envelopes.

A second possibility is to employ a public access mechanism similar to what TURN proposes. In other words, for every political message PG&E propagates in the *Progress,* we would allow TURN or other consumer groups to reply. We realize such opportunities to reply are already provided by private media. But we are concerned that we may lack the expertise, staff resources and/or public mandate to devote ourselves to the task of identifying what is or is not political speech in any given instance. We also are concerned that we do not have in place a fair mechanism for determining just who should be allowed to respond to PG&E. Should it be TURN? California Manufacturers Association? California Retailers Association? Citizens Action League? Perhaps we should allow for a lottery to determine such opportunity to respond. However, we think this would simply result in chaos and confusion. Again, we think this is a problem to which TURN has given insufficient attention. TURN itself recognizes the difficulties inherent in an access mechanism.

A third possiblity is to charge PG&E a fee for use of the "extra" space whenever it indulges in political speech. Again we see problems in identifying what is or is not political speech. We think it possible that innumerable hours of hearing time would be devoted to identifying what fee should be charged. Given our many other tasks, we do not think that would be productive.

A fourth possibility is to auction the extra space off to the highest reputable commercial advertiser. We invite TURN to report to us more fully on the experiment underway at Kansas Gas and Electric. In this era of high utility bills, we think every means of meeting the revenue requirement without increasing customers' bills must be explored. Such advertising would be similar to the Yellow Pages space sold by telephone utilities, except that the space available would only be the "extra" space as defined above. We think it possible that a significant amount of money could be raised by this means. We also think it possible that devoting the "extra" space to commercial speech solely for purposes of revenue generation to offset the revenue requirement would avoid the difficult First Amendment problems associated with the first three possibilities discussed above.

There may be other possibilities. We invite TURN or any other interested party to file an application with this Commission with a proposed solution to the "extra" space problem. The application would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the "extra space" more efficiently for ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such application.

[Relevant Findings of Fact of Decision No. 93887]

52. It is reasonable for PG&E to seek recovery of Nuclear Department A&G expenses relating to Diablo in the Diablo offset proceedings.

53. PG&E should resolve the operating status of Humboldt by the time it files its next NOI for 1984.

54. It is reasonable for PG&E to include only short-term borrowings in excess of balancing account undercollections and short-term investments in calculating the AFUDC rate.

55. It is reasonable to exclude estimated Canadian take-or-pay payments from Gas Department rate base and to consider carrying costs related to take-or-pay payments in a GAC proceeding.

56. A conservation incentive program has the potential to stimulate greater productivity in utility conservation programs but there is insufficient evidentiary basis for adoption of such a program in this proceeding.

57. It is reasonable to require PG&E to submit a report on or before March 31, 1983 showing for 1982 the dollars budgeted for maintenance, the dollars spent, and the status of its maintenance program.

58. Because the cost of envelopes and postage is included in the development of revenue requirement, the "extra" space (now occupied by the *Progress*) in the envelopes used for billing and dividend checks is properly considered as ratepayer property. The "extra" space is the space remaining, after inclusion of the monthly bill, dividend check and/or legal notices, for inclusion of other materials up to such total envelope weight as will not result in additional postage cost.

58a. There is a cost to ratepayers as a result of PG&E's using the "extra" space in billing envelopes for mailing the PG&E *Progress;* there is no cost to ratepayers from PG&E's using the "extra" space for mailing the *Progress* to shareholders with dividend checks.

59. PG&E improperly recovers the cost of mailing its political advertising to ratepayers through its use of the extra space in billing envelopes because this practice allocates to PG&E, and deprives the ratepayers of, the economic value of the "extra" space in the billing envelope.

60. The mose efficient means of capturing for ratepayers' benefit the full economic value of the extra space remains to be determined in a future proceeding.

61. It is reasonable to require PG&E to maintain records on its conservation fund expenditures on a program-by-program basis so that program expenditures may be separately identified, justified, and evaluated for reasonableness.

62. It is reasonable to revise the AER to $.00276 kWh to produce $10,684,000 in additional AER revenues in recognition of the 12.20% rate of return adopted in this decision.

APPENDIX E

SUPREME COURT
FILED
OCT 4, 1984
LAURENCE P. GILL, *Clerk*
Deputy

ORDER DENYING WRIT OF REVIEW

S.F. No. 24734

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PACIFIC GAS & ELECTRIC COMPANY, *Etc.*,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION, *et al.*,
Respondent.

KAUS, J., DID NOT PARTICIPATE.

Petition for writ of review DENIED.

Grodin, J. and Lucas, J., are of the opinion the petition should be granted.

BIRD
Chief Justice

APPENDIX F

SUPREME COURT
FILED
NOV 5 1984
LAURENCE P GILL, Clerk
Deputy

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

PACIFIC GAS AND ELECTRIC COMPANY.
Appellant.

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.
Appellee.

No. 24734

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Pacific Gas and Electric Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, denying a writ of review of the decision of the Public Utilities Commission of the State of California, entered in this action on October 4, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATE: November 5, 1984

MALCOLM H. FURBUSH
ROBERT OHLBACH
PETER W. HANSCHEN
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By _____
ROBERT L. HARRIS
Attorneys for Appellant
Pacific Gas and Electric Company

PROOF OF SERVICE BY MAIL
(C.C.P. Secs. 1013a(1) and 2015.5)

I, the undersigned, state that I am a citizen of the United States and employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; that my business address is 77 Beale Street, San Francisco, California 94106; and that on the date set out below I deposited a true copy of the attached

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

sealed in envelope(s) with postage thereon fully prepaid in a mailbox regularly maintained by the Government of the United States in the said City and County and addressed as follows:

JANICE E. KERR
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Center for Law in
the Public Interest
10951 West Pico Blvd.
Los Angeles, CA 90064

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct:

November 5, 1984 (Date)

MARLENE DONG (Signature)

APPENDIX G

PUBLIC UTILITIES
COMMISSION
MAY 31, 1983
SAN FRANCISCO OFFICE

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, *Complainant,* vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, *Defendant.*	**Complaint No. 83-05-13**

1. TOWARD UTILITY RATE NORMALIZATION (hereinafter TURN), complainant in this proceeding, is a non-profit California corporation with principal offices in the City and County of San Francisco. TURN represents the interests of residential utility consumers generally, as well as specific consumer organizations and constituencies, such as the statewide Consumer Federation of California, a federation of approximately one hundred organizations; the Consumer's Cooperative of Berkeley, with a membership of approximately 90,000 families; San Francisco Consumer Action; the California Legislative Council for Older Americans; the California Gray Panthers and other organizations and individuals.

2. PACIFIC GAS & ELECTRIC COMPANY (hereinafter PG&E), a California corporation, is a public utility providing electric and gas service to much of Northern California, with principal offices at 77 Beale St., San Francisco, California. PG&E is subject to regulation by the Public Utilities Commission of the State of California.

3. PG&E sends a monthly bill by first class mail to each of its electricity and natural gas customers. The weight of the envelope—and the bill and legal notices it contains—is less than one ounce. PG&E includes an insert ("The PG&E Progress") in the "extra space" available in said envelope.

4. In Decision No. 93887, issued December 1981 (as modified by Decision No. 82-03-047 issued March 2, 1982) the Commission declared that the "extra space" in the billing envelope belonged to the ratepayer and could be utilized on the ratepayers' behalf for some beneficial public purpose. The Commission specifically invited TURN or other parties to use the Commission's complaint mechanism to offer suggestions for the use of the extra space.

> We invite TURN or any other interested party to file a complaint with this Commission with a proposed solution to this 'extra' space problem. The complaint would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the 'extra space' more efficiently for ratepayers' benefit. (D. 82-03-047 at p. 8)

5. In D. 83-04-020 issued April 6, 1983 the Commission authorized the Utility Consumers Action Network (UCAN) to insert informative printed material in the billing envelopes of San Diego Gas & Electric Company for the purpose of soliciting memberships and contributions for UCAN.

6. PG&E reserves for itself the exclusive right to use the "extra space" in the billing envelope and has therefore violated an order of the Commission, as promulgated in Decision No. 93887. (PG&E's explicit refusal to permit TURN access to the extra space is documented in Exhibit A, attached hereto.)

7. PG&E has the mechanical equipment necessary to include inserts (such as additional printed material or envelopes) in its billing packets.

8. PG&E ratepayers will benefit if intervenors representing them in CPUC proceedings have sufficient funds to engage attorneys, witnesses, and other competent advocates.

9. Currently residential consumer advocates such as TURN do not have sufficient funds to participate fully in all important PG&E proceedings before this Commission.

10. TURN has submitted herewith (in Exhibit B of this Complaint) alternate proposals for one beneficial public use of the extra space in the PG&E billing envelope, to wit, the circulation of a "Consumer Advocacy Checkoff" to solicit voluntary donations from PG&E's customers.

11. The "Consumer Advocacy Checkoff" is reasonably likely to attract a significant number of voluntary donations from PG&E customers. Therefore, this use of the extra space in the PG&E billing envelope is a more effective use of the economic value of that space than that provided by the existing alternatives, i.e., the dissemination of the "PG&E Progress" and/or the non-use of the extra space.

12. The "Consumer Advocacy Checkoff" is one beneficial use of the extra space; approval by the Commission of the TURN proposal will not preclude later approval of other beneficial uses.

RELIEF SOUGHT

WHEREFORE, TURN, complainant in this action, respectfully requests that the California Public Utilities Commission act expeditiously and order that:

1. PG&E shall make available access to the extra space in its billing envelopes for the purpose of circulating to its electricity and natural gas customers a "Consumer Advocacy Checkoff," as described in this order.

[*For Alternate Proposals One and Two*]

2. A "Consumer Advocacy Checkoff" insert shall be prepared that will serve to: 1) Explain this program; 2) Set forth a list of those pending and anticipated PG&E applications and other cases likely to have a significant effect on the customers' rates and service; and, 3) Invite voluntary donations to support the advocacy of certain residential consumer organizations on behalf of PG&E's residential customers before this Commission.

[*For Alternate Proposal Three*]

2. A "Consumer Advocacy Checkoff" insert shall be prepared that will serve to: 1) Explain the program; 2) Set forth a list of those pending and anticipated PG&E applications and other cases likely to have a significant effect on the customers' rates and service; and, 3) Invite voluntary donations to support TURN'S advocacy on behalf of PG&E's residential customers before this Commission.

3. Access to the billing envelope shall be provided for this purpose no fewer than four times per year.

4. PG&E shall continue to provide access to the billing envelope for this purpose until two years from the effective date of this order unless otherwise extended or terminated by order of this Commission.

5. All costs associated with printing and inserting the Consumer Advocacy Checkoff in the PG&E billing envelope shall be defrayed by TURN and the other organizations, if any, participating in the Checkoff. Costs shall be allocated in proportion to each organization's share of the total proceeds of the Checkoff solicitation.

6. All such further relief that the Commission deems proper be granted.

TOWARD UTILITY RATE
NORMALIZATION

By: SYLVIA M. SIEGEL

Sylvia M. Siegel
Executive Director

Dated: May 31, 1983

TOWARD UTILITY RATE NORMALIZATION
693 Mission Street
2nd Floor
San Francisco, CA 94105
(415) 543-1576

March 7, 1983

Robert Ohlbach, Esq.
General Attorney
Pacific Gas & Electric Co.
77 Beale St., P.O. BOX 7442
San Francisco, CA 94106

Dear Mr. Ohlbach:

As you are no doubt aware, the California Public Utilities Commission in Decision No. 93887 (issued 12-30-81) determined that the "extra" space contained in the PG&E billing envelope must be regarded as the property of the ratepayer. In view of this determination TURN—a representative of PG&E ratepayers—hereby requests the right to use this property for a beneficial public purpose. Specifically, in the near future we intend to submit a statement to your company for inclusion in the billing envelope. The proposed statement will discuss an issue of importance to your customers as consumers of electricity and natural gas and will outline a specific strategy for reducing the size of their monthly utility bills.

I am writing you now to ask for the following information:

1. As a matter of policy, will PG&E accept a message prepared by TURN for inclusion in the "extra" space?

2. If so, what specific criteria will you use to determine whether or not a particular message will actually be accepted for inclusion?

3. What, if any, expenses would you expect TURN to defray if a message prepared by it were inserted in the "extra" space?

4. How many days in advance of a particular monthly billing must you receive a message to allow sufficient time for printing and insertion?

I would appreciate receiving an answer to the above questions within ten days. TURN earnestly believes that our contemplated message should reach the ratepayers as soon as possible. When we have a clear statement of PG&E policy in this matter we will be able to draft a final version for submission to you.

Very truly yours,

SYLVIA M. SIEGEL
Executive Director

PACIFIC GAS AND ELECTRIC COMPANY
77 Beale Street, San Francisco,
California 94106
P. O. Box 7442, San Francisco,
California 94120
Telephone (415) 781-4211
Telecopier (415) 543-7813

March 16, 1983

Sylvia M. Siegel
Executive Director
Toward Utility Rate Normalization
693 Mission Street, 2nd Floor
San Francisco, CA 94105

Dear Mrs. Siegel:

Mr. Ohlbach has referred to me your letter of March 7, 1983, in which you indicated that Toward Utility Rate Normalization (TURN) intended to submit a statement for inclusion in PGandE's billing envelope. You also asked a number of questions on PGandE's policy on this matter and the procedures to be followed.

As you referenced, the CPUC has addressed this matter in its Decision No. 93887, as modified on rehearing by Decision 82-03-047. In those decisions, the Commission indicated that access to the so-called "extra" space in utility bill envelopes is a complicated issue with broad constitutional ramifications. Rather than advise you on PGandE's policy on this matter, I suggest that you follow the procedure ordered by the Commission in its decisions.

Very truly yours,

PETER W. HANSCHEN

EXHIBIT B

Consumer Advocacy Checkoff Proposals

TURN has formulated three alternate Consumer Advocacy Checkoff proposals. Proposal Number One envisions a program open to all qualified consumer organizations representing PG&E's residential customers in regulatory proceedings before this Commission. For reasons set forth in Exhibit C, attached hereto, this proposal asks that the CPUC and/or its designated representative (perhaps the Public Advisor) assume overall responsibility for screening participants and performing other routine and ministerial tasks.

Proposal Number Two removes the operation of the Checkoff program from the immediate supervision of the Commission and entrusts that responsibility to a "blue ribbon" panel composed of five members selected by the Senate President Pro Tempore from amongst past directors/counsel of the State Department of Consumer Affairs and former Commissioners of the CPUC.

Proposal Number Three asks that TURN be allowed to solicit voluntary donations from PG&E's customers by means of an insert placed in the extra space in the PG&E billing envelope. This proposal is obviously the simplest and requires no further CPUC involvement.

Proposal Number One

Four times a year a "Consumer Advocacy Checkoff" insert—produced and written by the CPUC's Public Advisor or other designated representative—would be included in the PG&E monthly billing envelope. This insert would do three things: 1) Advise the reader about the purpose of the Checkoff; 2) Describe pending PG&E cases that would affect the rates or utility service of residential customers; and 3) List those bone fide consumer advocacy organizations seeking financial support through this mechanism.

If a PG&E customer decided to contribute to one of these organizations he or she would use a special envelope included in the "extra space" to mail a donation to a central collection point, in care of the Public Advisor, for transmittal to that organization.

For illustrative purposes TURN suggests an appropriate insert might be worded as follows:

* * * * *

[This Message Has Been Prepared By the Public Advisor of the California Public Utilities Commission and Is Included in This Envelope by Order of the Commission. PG&E Does not Necessarily Agree with its Contents.]

Consumer Advocacy Checkoff

1. Background.

The California Public Utility Commission encourages the participation of informed intervenors in its regulatory proceedings. Although the Commission's own staff represents the interests of the public generally, intervenors, representing various specific classes of utility customers, help bring to its attention additional information which aids it in the decision-making process. Some intervenors are adequately funded by the voluntary contributions of their constituents, but others are either unable to participate in our proceedings or do so under the constraints of significant financial hardship. Accordingly, the Commission has decided to permit certain residential consumer representatives to use this extra space in the PG&E billing envelope to solicit funds for consumer advocacy.

The Commission cannot assume responsibility for the qualifications, efficacy, or financial accountability of the organizations listed below. Each such organization, however, has made the following showing: first, that it is a non-profit California corporation; second, that it will undertake to represent a constituency made up of PG&E's residential customers in one or more of the regulatory proceedings listed below; third,

that it has a mechanism to account for the receipt and disbursal of funds obtained through this solicitation and will make such information available to the public on an annual basis; fourth, that it could not participate in regulatory proceedings involving PG&E without significant financial hardship; and fifth, that it has an understanding of the regulatory process and a present ability to formulate issues and engage competent advocates and expert witnesses in pursuit of identified goals. If you would like to have more information about any of the organizations you may write directly to them at the addresses shown below.

2. Applications and Other CPUC Proceedings Affecting PG&E's Residential Gas and Electricity Tariffs.

[A list is provided here of those presently known PG&E applications or other cases that will have a significant effect on the customers' utility bill, and which will be heard within the next 12 months. A brief description of the issues presented and the effect on the residential customers' bill (if known) is also included.]

----------Detach Here ----------

Residential Consumer Advocacy Organizations.

I wish to contribute $ to the organization checked below (A "*" next to the name of an organization means that your contribution is tax-deductible).

.....

[A list of organizations, together with their addresses and dates of incorporation, is provided in this space]

.....

Name of Contributor _____

Street _____

City _____ Zip _____

*****

Proposal Number Two

This proposal is similar in all respects to Proposal Number One except that all functions performed by the Commission or its designated representative would be performed by a "blue ribbon" panel (or under its supervision).

Proposal Number Three

TURN would prepare an insert basically similar to that described above. For illustrative purposes such an insert might read as follows:

*****

[This Message Has Been Prepared By Toward Utility Rate Normalization (TURN) and Is Included in This Envelope by Order of the Commission. PG&E Does Not Necessarily Agree with its Contents.]

Consumer Advocacy Checkoff

The California Public Utility Commission encourages the participation of informed intervenors in its regulatory proceedings. Although the Commission's own staff represents the interests of the public generally, intervenors, representing various specific classes of utility customers, help bring to its attention additional information which aids it in the decision-making process. Some intervenors are adequately funded by the voluntary contributions of their constituents, but others are either unable to participate in its proceedings or do so under the constraints of significant financial hardship. Accordingly, the Commission has decided to permit TURN to use this extra space in the PG&E billing envelope to solicit funds for consumer advocacy.

The Commission cannot assume responsibility for the efficacy or financial accountability of TURN. However, the Commission has previously found that TURN has demonstrated an ability to participate effectively in the its regulatory

procedings, and that such participation by TURN involved a significant financial hardship. Furthermore, in consideration for the use of this space in the PG&E billing envelope TURN has made the following commitment: first, that it will undertake to represent PG&E's residential customers in one or more of the regulatory proceedings listed below; second, that it will account for the receipt and disbursal of funds obtained through this solicitation, and will make such information available to the public on an annual basis.

If you would like to have more information about TURN you may write directly to it the address shown below.

2. Applications and Other CPUC Proceedings Affecting PG&E's Residential Gas and Electricity Tariffs.

[A list is provided here of those presently known PG&E applications or other cases that will have a significant effect on the customers' utility bill, and which will be heard within the next 12 months. A brief description of the issues presented and the effect on the residential customers' bill (if known) is also included.]

----------Detach Here ----------

Residential Consumer Advocacy Organizations.

I wish to contribute $ to TURN (TURN is a non-profit tax exempt corporation, your contribution is tax deductible).

Name of Contributor _____

Street _____

City _____ Zip _____

* * * * *

EXHIBIT C

Proposal for a Mechanism to Select Residential Consumer Groups for Inclusion in the Consumer Advocacy Checkoff.

I. Policy Considerations

The Commission is ultimately responsible for selecting residential consumer groups for inclusion in the Consumer Advocacy Checkoff. Such a selection is necessary for two reasons: first, there may not be room in the insert to list all groups that might wish to be included; second, there should be some screening to exclude those who cannot demonstrate a commitment to the purpose of the program, i.e., significant advocacy in PG&E regulatory proceedings on behalf of a residential consumer constituency.

The Commission's screening responsibility, however, cannot be extended too far. The Commission cannot and should not guarantee the efficacy, qualifications, or financial responsibility of those groups participating in the program. All that the Commission can reasonably be expected to do is to determine whether a group has made a satisfactory threshhold showing concerning its legal structure, its constituency, and its understanding of, and commitment to effective participation in CPUC regulatory proceedings involving PG&E. The mechanism for making this determination should be clear and simple, for neither the Commission nor potential participants would wish to devote inordinate time and energy to a matter that is merely ancillary to the advocacy itself.

II. Legal Considerations

In its previous decisions on the subject of bill inserts the Commission has extensively discussed the legal issues involved. Any proposal for a mechanism to select participants for the Consumer Advocacy Checkoff should be responsive to this prior legal analysis. In particular, the mechanism should involve an appropriate exercise of the Commission's powers to advance a reasonable state interest. It may be taken for granted that the Commission has the power, and indeed the duty, to exercise a "stewardship" over the extra space on behalf of the PG&E

ratepayer. Providing access to that extra space, for the purposes urged in this complaint advances a valid state interest, to wit, enhancing the effectiveness of regulatory proceedings. Furthermore, because the extra space has a real economic value, a value that is being used in this proposal for the benefit of the Consumer Advocacy Checkoff, the Commission has the right to decide which groups are most qualified for participation in a program which, by its very nature, has limited space.

If the Commission's power to exercise its discretion and select participants for the Consumer Advocacy Checkoff is granted, the *constraint* on that power would surely be the Constitutional protections of free speech. In short, the Commission cannot act to censor the content of printed material in the extra space, nor can it judge in advance the merits of a potential participant's planned intervention in its regulatory proceedings.

III. Proposal.

The Commission could require that any groups wishing to participate in the Consumer Advocacy Checkoff file a petition (analagous to the petition required for PURPA qualification under the Commission's current rules). Such a petition would show that the petitioner had a legal structure—perhaps a non-profit corporate structure—and represented a constituency made up of residential customers of PG&E. The petitioner would also be asked to show an understanding of the Commission's regulatory process and to demonstrate an ability to engage attorneys, expert witnesses, and other advocates in pursuit of specific goals. As a precondition of this pro forma showing of technical competence, the Commission might require that an applicant have participated in at least one prior CPUC regulatory proceeding.

In order to establish minimum standards of financial responsibility, the Commission could require that each petitioner agree to file for public inspection a year-end report on its receipts and disbursements under this program. Once the program was actually underway, a designated representative of the Commission (perhaps the Public Advisor) would be responsible for receiving and tallying all contributions and forwarding them to their designated recipients. This would

provide an additional control over the funds received through this program and would permit an allocation of program expenses in proportion to tallied receipts.

All costs associated with the program—i.e., the printing of inserts and their handling by PG&E and all administrative costs incurred by the Commission or its representatives—would be borne by the participants as "overhead." The program would be viewed as a two-year experiment, with three insertions per year. Upon completion of the experiment the Commission would decide whether or not it should be extended further.

APPENDIX H

Decision 83-04-020 April 6, 1983

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CENTER FOR PUBLIC INTEREST LAW and ROBERT L. SIMMONS,
Complainants,

vs.

SAN DIEGO GAS & ELECTRIC CO.,
Defendant.

Case 82-03-05 (Filed March 11, 1982)

ROBERT C. FELLMETH, Attorney at Law, for Complainants.

RANDALL W. CHILDRESS, Attorney at Law, for Defendant.

ALBERTO GUERRERO, Attorney at Law, for the Commission staff.

OPINION

Summary

By the following decision we grant in a modified form the proposal of complainants, the Center for Public Interest Law (Center) and Robert L. Simmons to allow access to San Diego Gas & Electric Company's (SDG&E) billing envelope extra space, on an interim basis, for two purposes: First, to allow for the solicitation of funds and members sufficient to permit holding an election by ratepayers of a consumer representative organization designated by complainants as the Utility Consumers Action Network (UCAN); and, second, to permit UCAN, once it is elected, to insert informative printed material. Both uses are restricted as described within. In addition we grant SDG&E continued access to the extra space.

Background

In December 1981, we issued Decision (D.) 93887 as a result of the general rate case filed by Pacific Gas and Electric Company(PG&E) early that year. After rehearing, the decision was modified by D.82-03-047 issued March 2, 1982. A petition for writ of review of these decisions was filed by Toward Utility Rate Normalization. This petition was denied by the California Supreme Court on August 13, 1982.

One of the issues in that case was the appropriate use of "extra space" in the utility's billing envelope. We defined extra space as that space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, which can be used for added materials without incurring additional postage costs. In other words, the "space" is measured in terms of available weight.[1] Thus, whenever the bill and any necessary legal notices, if there are such, together weigh less than one or more full ounces, then there is "extra space" for added materials. At the time of the PG&E case, that company was including a newsletter in the extra space. The newsletter contained utility political advertising as well as information about conservation, cost-saving measures, Commission action, and the like.

We held that the extra space belongs to the ratepayer since the cost of envelopes and postage is included in the development of the utility's revenue requirement.

We also held that the extra space has economic value which belongs to the ratepayers. We found that when that space is used by the utility for its own advertising inserts instead of being used for some other purpose (such as selling it to advertisers or conservation information), the ratepayers forego savings from advertising revenue or savings generated by conservation information while the utility may capture the value of such savings thereby recovering an "opportunity cost" from the ratepayers. The minimum value of the opportunity cost recovered by the utility is the fourth class bulk mail rate that the utility would otherwise have to pay to send out such inserts.

[1] The postage rate is charged for increments of one ounce, fractions of an ounce being charged at the next higher rate. (See Exhibit 31.)

We declined, however, to ban insertion of the newsletter, finding that it did have information from time to time that was useful to the ratepayers and that this benefit must be weighed against the opportunity cost borne by those ratepayers. We decided that before taking action we needed more information about how that balance should be struck and/or what permissible means of more efficiently using the extra space could be employed. After listing several possibilities and our concerns about each, we concluded by stating:

> "We invite TURN [Toward Utility Rate Normalization, the protestant on this issue] or any other interested party to file a complaint with this Commission with a proposed solution to this 'extra' space problem. The complaint would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the 'extra space' more efficiently for ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such complaint." (D.82-03-047 at pg. 8.)

By the broad language of the above invitation we made it clear that our conclusion about billing envelope extra space applied to all utilities we regulate. Apparently, in response to that invitation, the Center and Simmons filed with the Commission a document which they captioned "Petition to the Public Utilities Commission for Modification of San Diego Gas & Electric General Rate Decision". Our Docket Office recharacterized it as a complaint upon receiving it for filing. The document details a means of giving ratepayers use of the extra billing envelope space of SDG&E. The proposal advocates using the extra space to solicit funds and hold an election for the creation of a corporation called the San Diego Utility Consumers Action Network, Inc., or "UCAN", to represent SDG&E ratepayers before the Commission and elsewhere, and to provide the ratepayers with information concerning matters UCAN determines may affect their interests.

Following a period for public comment, hearings were held on the complaint in the Federal Building in San Diego on September 13 and in the Commission's Courtroom in Los

Angeles on September 14 and 15, 1982 before Administrative Law Judge (ALJ) Colgan. The matter was submitted on September 15, 1982 pending receipt of certain late-filed exhibits and briefs. The last of these items was received in late February 1983, when a disputed discovery matter was finally resolved.

In April 1982, SDG&E filed a motion to dismiss the complaint. We will deny the motion[2] on each ground cited. First, since this is not a complaint as to the reasonableness of rates or charges, SDG&E's claim regarding insufficiency on that ground is without merit. Second, the claim that allegations in the complaint are vague and ambiguous is also without merit. The complaint is quite specific. Third, contrary to SDG&E's claim, the complaint does set forth an act or thing not being done in violation or claimed to be in violation of an order of the Commission as required by Public Utilities (PU) Code Section 1702. The complaint alleges a failure to afford SDG&E ratepayers access to the extra space which we found to belong to them in D.82-03-047. Finally, there is no question that the Center and Simmons have standing to bring this action. They are SDG&E ratepayers; nothing further need be shown.

The Proposal

The complainants in this matter are an individual SDG&E ratepayer, Simmons, and the Center, which describes itself as "an active member of the San Diego community, composed primarily of San Diego residents". The Center also states that it is a part of the University of San Diego composed of five staff members and about 50 graduate and law students which monitors "the activities of 60 [California] boards, commissions, and departments with entry control, rate regulation, or related regulatory powers over business and trades".[3] It also publishes the "California Regulatory Law Reporter".

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[2] We will also deny SDG&E's motion, filed January 10, 1983, to strike various parts of complainants' Reply Brief which SDG&E claims constitute improper argument and misconduct. This decision gives no weight to unsubstantiated arguments or unsupported claims. It relies only on evidence properly before the Commission. We will leave the record as it stands.

[3] Complaint, page 22.

The proposal the Center and Simmons advocate is set forth in detail as Exhibit 14, which is a modified version of Appendix A of the complaint.[4] In brief, it calls for the creation of a voluntarily funded nonprofit corporation with a board of directors. Each director represents a district[5] within SDG&E's service area and is to be elected by UCAN members from the appropriate district. Any SDG&E customer of 16 years of age or older[6] who has contributed $4 to UCAN may vote for the district director. Once the board is established, it is to hire, direct, and supervise an executive director who will employ a staff.

The stated purpose of UCAN is to represent the interests of SDG&E's residential and small business customers before regulatory agencies such as the Commission, to educate the ratepayers, and to assist them in resolving individual complaints. Neither Simmons nor the Center propose any role for themselves in any phase of this proposal beyond their advocacy in the present proceeding.

The enumerated functions appear to parallel the functions of the Commission staff. However, the Center offered witness testimony showing that UCAN would not duplicate staff's function. Further, as we elaborate below we continue to believe that consumer advocacy is useful to the development of a full record.

Need for Consumer Advocates in SDG&E Proceedings

Both parties have addressed the issue of need in some detail in their post-hearing briefs. Neither contends that consumer advocates have no place in SDG&E's proceedings. Simmons and the Center identify various problems which they claim are not resolved by the current system. SDG&E points to the Commission's present complaint procedure, the work of our Consumer Affairs Branch, and our intervention procedures

[4] Both Exhibit 14 and Appendix A appear to be closely patterned after California Assembly Bill (AB) 2931 (which was unsuccessfully introduced during the 1982 session) and the Wisconsin Citizens Utility Board (CUB) statutes (see hearing Exhibit 25). These measures and at least three bills of similar intent pending before the current session of the Legislature (AB 45, Chacon; SB 340, Greene; and SB 399, Rosenthal) differ from the UCAN proposal primarily in their statewide scope.

[5] The boundaries of these districts are not specified by Exhibit 14.

[6] A small business corporation may also be a member.

(which include a possibility for compensation) as adequate to meet consumer's needs.

There is no question that participation by representatives of consumer groups tends to enhance the record in our proceedings. The California Supreme Court reminded us of that in deciding *Consumers' Lobby Against Monopolies (CLAM) v. Public Utilities Commission* (1979) 25 C 3d 891 which found that the Commission has jurisdiction to award attorneys' fees and costs to consumer representatives under certain circumstances. In reaching this conclusion the Court noted:

> "[T]he staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing (Pub. Util. Code, §1731) or judicial review (Id., §1756) of Commission decisions." (25 C 3d 891, 908.)

We hasten to add that our staff is a dedicated, professional, highly competent one. The observation of the Court merely points out an inevitable facet of the unique position of our staff. There can be no denying that the principal representative of the residential and small business ratepayer is in fact the staff, whose job it is to challenge a utility's showing and recommend the minimum rates necessary to ensure adequate service and provide a reasonable return to the utility. The staff, however, may not pursue appeals. Thus, if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in our proceedings. The Legal Division agrees with us, since its post-hearing brief supports the UCAN concept.

Furthermore, while we believe that the opportunities for compensation for participation in our proceedings help assure the development of a full and fair record, we recognize the merit of the Center and Simmons' contention that such opportunity may seem illusory to an individual ratepayer. What the complainants propose is another alternative, which relies neither upon increased funding through rates nor necessarily upon compensation under one of our present procedures. It appears that there are many ratepayers in SDG&E's service area who would relish the opportunity of belonging to an organization which could afford to hire people with technical

expertise to represent their particular interests in proceedings as technical as most of our major cases are. In fact, many of these ratepayers have written to us to express their support of this UCAN proposal.

The real question is not whether a need for consumer advocacy exists or whether the UCAN proposal is a good idea, but whether use of extra space in the billing envelope represents an efficient use of the extra space[7] which benefits SDG&E ratepayers. In addition, we must determine if there are any legal or policy considerations which forbid its implementation.

Scope of this Case

During the hearing representatives of Sourthern California Gas Company and Southern California Edison Company lodged written motions to intervene (RT Vol. 1, pg. 2) on the ground that the resultant decision might affect all utilities within the State, including them. For the same reason, counsel for SDG&E argued that this complaint should be consolidated with a statewide Order Instituting Investigation (OII) (RT Vol. 1, pg. 8).

The motions were properly denied (RT Vol. 2, pg. 145). This complaint only involves SDG&E and its ratepayers and in no way affects the rights or duties of other utilities. We also reject SDG&E's position for the similar reason that no statewide remedy is proposed and none is implicit or necessary to the disposition of this complaint.

Merit of the Proposal

We find complainants' proposal appealing. One of our primary concerns in determining how to best give the ratepayers the benefit of extra billing envelope space is assurance

[7] There is no question that "extra space" does exist in SDG&E's billing envelopes. SDG&E regularly includes an insert called "Lite Lines" along with its bills. A witness testified (RT 279-282) that she took a recent billing envelope which included a bill, a return envelope, a 2-page Lite Lines, and another insert on energy saving to the U.S. Post Office and added to it a mock-up UCAN insert. The post office weighed the entire packet and charged 20¢ for a stamp—the present minimum first class rate. Furthermore, the record shows that SDG&E has the capacity to insert at least six items into its billing envelope (See Exhibit 9).

that it can benefit the greatest number of ratepayers and not just certain individuals or interest groups. The best way this society has devised for arriving at such a result is the democratic election process. This proposal limits voting to "members"; however, membership requires only three things: (a) at least 16 years of age, (b) status as an SDG&E residential or small business consumer (which includes persons in master-metered buildings), and (c) a contribution of at least $4 in the preceding or current fiscal year (Exhibit 14, Section 7022). While we may not have selected these precise criteria ourselves, they appear to be nondiscriminatory and reasonably related to the fair representation of SDG&E ratepayers.

We find the method of starting up to be of some concern. Contrary to the opinions expressed by some witnesses and by SDG&E, this proposal would not give the Center any role in UCAN. Rather, the proposal would have each Public Utilities Commission commissioner appoint one director to the first corporate board (Exhibit 14, Section 7072(a)). The function of this initial board of directors is to set in motion those things necessary to holding an election of a new board. As a precaution, these initial appointees are ineligible to be elected to such positions for three years (Exhibit 14, Sections 7081(a) and 7072(b)(6)). While the apparent intent of the proposed selection process is to assure fairness, we believe it inappropriate for the Commission to select the interim board, and we decline to do so. The proponents might wish to select some other person or entity to make the selections.

The proposal contemplates election by district. Exhibit 14, Section 7083, and other sections refer to State senatorial districts. This reference is not appropriate to this proposal, but the district concept is a good one. The initial board ought to select boundaries which encompass all SDG&E consumers and which create districts of approximately equal populations.

An appealing aspect of the present proposal is that it is supported by voluntary contributions. Both the costs of operation of the UCAN corporation and any costs incidental to adding UCAN-printed matter to the billing envelope are to come from this source (Exhibit 14, Sections 7061 and 7062).

In addition to the attributes described above, we note that UCAN's duties are restricted to nonpartisan, utility-related endeavors (Exhibit 14, Section 7037); it is required to make all its records, books or other data available to any member (Exhibit 14, Section 7040); its board is bound by strict conflict of interest provisions (Exhibit 14, Section 7071), and campaign contribution restrictions (Exhibit 14, Section 7086).

We greatly appreciate the testimony of Michele Radosevich, former state senator from Wisconsin and present public information director for its statewide CUB. Her testimony (RT Vol. 3, pgs. 300-346) reassured us that most of the problems which usually come to mind, such as extra cost of utility insertion of materials, can be and generally are resolved without undue conflict. The "wording" conflict Radosevich described (RT Vol. 3, pg. 318 et seq.) seems to us to imply some First Amendment problems. We think they would be avoided if the content of messages of UCAN or the utility were simply left up to each proponent.

From Radosevich's testimony and the Wisconsin CUB statute (Exhibit 25), we note that the UCAN proposal is somewhat different from the CUB in Wisconsin. The Wisconsin CUB, which serves all public utility ratepayers in proceedings involving all public utility companies participates primarily in major rate cases and in some cases involving policies of statewide significance analogous to our OII cases.

The UCAN proposal contemplates detailed attention to a single utility, including intercession in consumer complaint issues. We do not know if this consumer complaint aspect is necessary. We believe UCAN can best decide this issue for itself based on its own experience. UCAN can also decide for itself whether and how to devote its resources to rulemaking or other proceedings where the interests of SDG&E ratepayers may be at stake.

Radosevich also testified that CUB did not increase the length of rate case hearings, did not act as an obstructionist (RT Vol. 3, pg. 311), did not cause a great deal of extra cost for the utilities (RT Vol. 3, pg. 314), has been praised by the state's Public Service Commissioners for its beneficial work

(RT Vol. 3, pg. 315), and has been able to successfully explain the legitimacy of a utility's action to consumers when consumers were skeptical of the utility's explanation. The last factor is of no small consequence. Consumer skepticism is extremely high among SDG&E ratepayers. This skepticism has been exacerbated by sharp increases in SDG&E's rates. Accordingly, UCAN might well improve the public's view of SDG&E.

For these reasons, we will adopt an order requiring SDG&E to permit UCAN access under conditions we will describe. UCAN can only be fully functional after an elected board is in place. However, access should also be granted to the appointed board for a reasonable time so that it may solicit start-up funds and hold an election. We believe twelve months is sufficient for this phase. We also believe the baseline criteria established by this proposal for triggering an election—3,500 members and $15,000 in contributions—assure adequate consumer interest. If the criteria are met and a board is elected, eligibility for access shall continue until two years from the effective date of this order unless we determine otherwise.

The purpose of such limitation is to permit us to monitor the use of the extra space in SDG&E's billing envelopes. We must be certain that the extra space is used in a manner which clearly benefits ratepayers. Although only the UCAN proposal is before us now, it certainly does not represent the only possibility for effective use of that space. For instance, the check-off proposal suggested by Commissioner Gravelle in his concurrence to the TURN attorneys' fee case in D. 88532 (1978), 83 CPUC 471, might be equally or more effective. That proposal would have the Department of Consumer Affairs certify, under legislative guidelines, a list of consumer organizations which would appear on utility bills. The customer would then have the opportunity to pledge and pay any voluntary contribution to one of those organizations along with his or her utility bill payment. Should this proposal or other proposals be brought before us, we will examine the feasibility and benefits of each at that time.

The UCAN proposal probably does not cover every possible contingency and our criteria for access may require future

changes. We are willing to institute this experiment because we are convinced that this use of the extra envelope space is a basically sound, reasonable, and useful one that offers SDG&E's consumers an opportunity for more direct participation in our proceedings than they have had in the past. Beyond that, we believe this proposal will improve the relationship between the utility and the community by providing another source of information to the ratepayers. We are confident that SDG&E and UCAN will work together in good faith to overcome any problems and permit the ratepayers the opportunity to experience the full implementation of UCAN.

If insurmountable problems arise, we may have to issue further clarifying orders. We hope this will not be the case. We want the program to work and we want the parties to make it work. We believe they will.

The Nature of the Ratepayers' Right

We have stated that the extra space belongs to the ratepayers. In so doing, we are not so much describing a traditional property right as an equity right. We are not saying that everything paid for with ratepayer money is the sole property of the ratepayer. Rather, we are saying that the *reason* the ratepayers pay for the billing envelopes and postage is that those costs are an expense necessary to the operation of the utility. So, what the ratepayers are legitimately paying for is the conveyance of their bills and occasional legally mandated notices. Since these documents together do not generally add up to one ounce and the postage rate is calculated in increments of one ounce, the ratepayer has paid for some empty space (or, more exactly, some unused weight[8]).

It is the structure of postal rates that allows this issue to exist. If the rates were structured so that SDG&E only paid for weight actually used, then we would probably not permit the utility to add any inserts which would increase the cost of postage, and thus ratepayer cost.

[8] It may have occurred to the reader that the utility could moot this issue by substantially increasing the weight of its bills; however, we do not expect such an occurrence nor would we find it acceptable.

However, extra space (unused weight) does exist in SDG&E's billing envelopes and SDG&E uses it. This Commission believes that equity requires that the extra space be used in the manner most beneficial to the ratepayers who have paid for it. We are certain that SDG&E's use of the extra space is often useful to its ratepayers and we think it reasonable for SDG&E to have continued access to that space. However, we do not believe that access only by SDG&E to this space assures the most ratepayer benefit. Nor do we believe that totally banning any access to the extra space would be the most beneficial use. Rather, it appears that the most beneficial use of this space is one which provides the ratepayers with information.

We conclude, for the reasons described above, that it is appropriate for UCAN to have limited access to the extra space in the SDG&E billing envelope. Actual insertion of material in the envelope will commence only after we have received notice that an organization which conforms to the terms of this decision has been established and selection of an interim board has been completed. Copies of the articles of incorporation, bylaws, and list of interim board members and method by which they were selected should accompany this notice. The articles and bylaws should adhere to the following principles included in the UCAN proposal:

a. Nondiscriminatory membership criteria reasonably related to the fair representation of residential and small business ratepayers of SDG&E.

b. Democratically selected board members.

c. Representation on a basis of districts of equal population to assure community ties and proportionate representation.

d. Representation of residential and small business ratepayers meeting membership criteria.

e. A policy of open records and accountability to the membership via annual reports, meetings, and similar activities.

f. Strict conflict of interest regulation and campaign contribution restrictions for board members.

Once UCAN is established, the organization will be allowed prompt access to the extra space 4 times a year for the next 2 years. In the notice described above, UCAN should identify the months during which it plans to insert its material in the billing envelope. SDG&E should accommodate (sic) UCAN's schedule. We expect that any practical problem will be solved through good faith negotiations between the parties.

This limitation should in no way frustrate UCAN's objectives since it is free to supplement its bill inserts with other means of communicating with ratepayers—e.g., media, meetings, membership newsletters, etc. Since one function of UCAN is to present ratepayers with its view of SDG&E's operations, we think SDG&E should continue to have an opportunity to provide ratepayers with information it deems appropriate.

Departing from the proposal in Exhibit 14, we will not undertake to control the content of the matter inserted in any way. The only restrictions shall be that priority must be given to the billing and any legally mandated notices to customers, that UCAN shall reimburse SDG&E for any handling costs SDG&E incurs beyond its usual costs of billing as a result of adding UCAN's inserts, and that each party's inserts shall clearly identify their source. Further, all inserts should clearly state that the contents have neither been reviewed nor endorsed by this Commission.

We must add that our support of this UCAN proposal has considered the legality (constitutional and statutory) of such action and the implications of such action in light of the various pending and past bills to create a statewide CUB. Our conclusions regarding these matters are set out below.

Legality of Commission Action

The leading U.S. Supreme Court cases on the constitutionality of bill insert regulation are *Consolidated Edison Co. of New York v Public Service Commission of New York*

(1980) 447 US 530 (Con Ed) and *Central Hudson Gas & Elec. Corp. v Public Service Commission of New York* (1980) 447 US 557 (Central Hudson). These companion cases concern attempts by the New York Public Service Commission (PSC) to prevent utilities from including certain kinds of inserts in their billing envelopes. The former case involved political advertising in support of nuclear power and the latter involved advertising promoting the use of electricity. The Supreme Court found that the First Amendment to the U.S. Constitution protected each of these types of expression.

The issues are not, as SDG&E urges, analogous to the one before us here. Adoption of complainants' proposal does not deny SDG&E the right to free speech. At most, it is a "time, place, or manner restriction" which the Court specifically found to be acceptable if there is a showing of compelling state interest and the restriction is not based (as it was in *Con Ed* and *Central Hudson*) on the content or subject matter of the speech. The State interest, of course, is the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete consumer understanding possible of energy-related issues. Furthermore, our action is distinguishable from the cited cases in that we do not intend to bar or regulate SDG&E's use of its portion of the extra space. Indeed, adoption of the UCAN proposal should promote First Amendment values by expanding the views offered to SDG&E ratepayers.

SDG&E also suggests that *Con Ed* stands for the proposition that billing envelopes are the property of the utility and not the ratepayers. Our reading of that case reveals nothing to indicate that that view is accurate. The issue is only addressed, in fact, in Justice Blackman's (sic) dissent where he suggests that if such a property right argument were made in the future, it might achieve the end New York's PSC was seeking. In any case, as we explained above, we do not rely on a traditional property right analysis to reach our conclusion. We base it on equitable considerations.

SDG&E also claims that the Commission's allowing access as proposed might be construed as constitutionally impermissible "government favoritism for certain political speech over

another". We reiterate that we simply are granting ratepayers access to the billing envelope for communication with other ratepayers and in so doing we are neither favoring nor regulating any form of political speech. Our action grants access to both SDG&E and UCAN, an organization run by a democratically elected board of directors.[9] All qualified consumers willing to pay the nominal fee of $4 may participate[10] in choosing these directors and may, likewise, oust the directors following democratic procedures, if the directors fail to represent them. By allowing both SDG&E and UCAN access, we clearly avoid "government favoritism".

Finally, in response to SDG&E's claims that the UCAN proposal violates Public Utilities Code Section 532, we disagree. We are not favoring one group over another in allowing access to the extra space in SDG&E's billing envelope. The "privilege" of access under the proposal is uniformly extended to all SDG&E ratepayers, consistent with Section 532.

The federal Public Utilities Regulatory Policies Act of 1978 (P.L. 95-617, 16 U.S.C. Section 2601 et seq.) (PURPA) is a clear expression of the federal government's concern that consumers' interests be adequately represented in state rate proceedings involving electric utilities. Toward that end PURPA sets forth certain requirements for compensation of consumer participants. We enacted Commission Rules of Practice and Procedure 76.01 et seq. in compliance with these PURPA requirements.

PURPA, however, is not the only legal basis upon which we may act in extending participatory opportunities to consumers.

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[9] There is also access for a limited time by the interim board of directors. As explained above, however, this appointed board's functions are both temporary and restricted.

[10] In addition to individual consumers, the proposal also includes representation of small business consumers. While the term "small business consumers" has not been defined in the present rules, we expect that UCAN's board of directors will define it so as to include all businesses which are small enough so that it could reasonably be expected that it would not be economically feasible for them to represent themselves in CPUC proceedings. Such definition will assure the widest reasonable representation.

This Commission, unlike those of states such as Wisconsin, derives its authority directly from the State Constitution, See California Constitution, Article XII. Section 6 of Article XII broadly grants the Commission power to "establish rules . . . for all public utilities subject to its jurisdiction." Our adoption of rules under which SDG&E must permit billing envelope access is certainly within the scope of that constitutional authority.

In addition, the Legislature has enacted three statutes in the PU Code which bear directly upon the propriety of our action here.

The first, Section 701, confers upon this Commission the right to "do all things, whether specifically designated in [The Public Utilities Act] or in addition thereto, which are necessary and convenient" in the supervision and regulation of every public utility in California. This grant of authority has traditionally been liberally construed by the State Supreme Court. These additional powers exercised by this Commission simply "must be cognate and germane to the regulation of public utilities" *Southern California Gas v. PUC* (1979) 24 C. 3d 653, 656.

The second relevant section of the PU Code is Section 770(a) which permits this Commission, after hearing, to "[a]scertain and fix just and reasonable . . . regulations . . . to be . . . observed, and followed by all electrical, gas, water, and heat corporations."

The final pertinent section is Section 761 which states:

> "Whenever the commission, after a hearing, finds that the . . . practices . . . of any public utility . . . are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall determine and, by order or rule, fix the rules . . . to be observed."

We believe the present practice of SDG&E with respect to its billing envelope extra space is inadequate. Therefore, an order to change this practice is appropriate under Section 761.

The background of constitutional, statutory, and case law described above illustrates, beyond question, that this Commission may legally act in the manner proposed in the complaint before us.

Effect of Legislature's Action

Finally, we address the issue of the effect of our taking such legally permissible action when the Legislature failed to pass CUB legislation during the last session and has similar legislation presently pending before it. We conclude our action here is distinct from all legislative proposals to date.

It must be remembered that the precipitating factor in the present proceeding was this Commission's December 1981 invitation to interested parties to file a complaint with us with a "proposed solution to the 'extra' space problem". (D.93887 as modified by D.82-03-047.) We believe that the proposed use of SDG&E's extra space offers more benefit to SDG&E's ratepayers than the present use.

Legislation to date has called for statewide implementation of the CUB concept. These bills cover every electricity, water, natural gas, and telephone public utility in the State. The narrowness of the complaint before us removes it from legislative contemplation since it is not of statewide consequence. At this time, we cannot predict what actions this legislature or future legislatures might take with respect to CUBs. Until such a time as CUB legislation may be enacted, we cannot assess how the UCAN proposal might integrate or conflict with a legislatively-established organization. If and when that event occurs, we would expect the parties to this proceeding to notify us of any modifications to this decision which may be necessary.

Findings of Fact

1. Extra space exists in SDG&E's monthly billing packets.

2. SDG&E is presently the only user of its billing envelope extra space.

3. This complaint proposes the formation of UCAN as a nonprofit corporation made up of SDG&E residential and small business ratepayers using SDG&E billing envelope space to communicate with ratepayers about issues related to SDG&E.

4. This extra space represents economic value that is lost to SDG&E ratepayers when not used to their benefit.

5. Access to the extra space by UCAN would benefit SDG&E's ratepayers.

6. Continued access by SDG&E would also benefit SDG&E's ratepayers.

7. SDG&E has the mechanical equipment necessary to include a UCAN insert in its billing packets.

8. The past and pending CUB legislation contemplates a program with statewide implications.

9. Unlike legislative proposals to date, UCAN would focus its efforts exclusively on matters related to SDG&E.

10. UCAN is constituted to assure nonpartisan solicitation and to represent the views and concerns of San Diego ratepayers.

11. The complaint did state a cause of action under PU Code Section 1702.

12. The relief requested would have benefit to this Commission in the conduct of proceedings affecting SDG&E ratepayers.

13. Use of the extra billing envelope space by UCAN is a more effective use of the benefit of economic value of that space for SDG&E's ratepayers than not doing so.

Conclusions of Law

1. The California Constitution has endowed this Commission with broad rulemaking power.

2. The Legislature has granted this Commission broad statutory authority to regulate public utilities.

3. The Center's and Simmons' relief is specifically related to improvement of the operations of SDG&E and is within the constitutional and statutory jurisdiction of this Commission.

4. This Commission possesses the authority to grant the relief requested.

5. SDG&E's constitutional rights are not impeded by UCAN access to billing envelopes.

6. The motion of SDG&E to dismiss this complaint should be denied.

7. The motions of Southern California Gas Company and Southern California Edison Company to intervene were properly denied.

8. The motion of SDG&E to strike certain parts of complainants' reply brief should be denied.

9. This proposal does not affect the operations or interests of Southern California Gas Company or Southern California Edison Company.

ORDER

IT IS ORDERED THAT:

1. The motion of San Diego Gas & Electric Company (SDG&E) to dismiss Case 82-03-05 is denied.

2. The Administrative Law Judge's Ruling denying the motions to intervene filed by Southern California Gas Company and Southern California Edison Company is affirmed.

3. The motion of SDG&E to strike portions of complainants' reply brief is denied.

4. SDG&E will make available to the Utility Consumers Action Network (UCAN) access to extra space in SDG&E's billing envelopes as described in this decision.

5. Access shall be provided once UCAN files a notice with this Commission indicating that an organization which conforms to the terms of this decision has been established and selection of an interim board has been completed. The notice should include copies of UCAN's articles of incorporation, bylaws, list of interim directors, and a description of the method by which such directors were selected.

6. Access shall be provided to the appointed board for a period of up to twelve months. This access shall be

provided four times during the twelve month period. Such times shall be selected by UCAN and identified in the notice described above. This appointed body's use of the extra space shall be limited to the inclusion of information aimed at soliciting members and funds sufficient to permit the holding of an election, and then information about the election.

7. Upon election of a board of directors, or upon the expiration of one year from the effective date of this order, whichever is first, access by the appointed board shall cease. If a board has been elected it shall then be provided with access to the extra space four times a year. UCAN shall provide SDG&E with reasonable notice of the months during which it desires access.

8. SDG&E shall continue to provide UCAN with access until two years from the effective date of this order unless otherwise extended or terminated by order of this Commission.

9. All extra space inserts shall clearly identify their source and indicate that their contents have neither been reviewed nor endorsed by this Commission.

This order becomes effective 30 days from today.

Dated April 6, 1983, at San Francisco, California.

I will file a concurring opinion.

/s/ LEONARD M. GRIMES, JR.

President

LEONARD M. GRIMES, JR.

President

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL

Commissioners

COMMISSIONER LEONARD M. GRIMES, JR., Concurring:

I concur. I believe that today's decision has great promise for both SDG&E and its ratepayers. If UCAN succeeds, San Diego ratepayers will have an additional means of participating in our decision-making process. To be effective, however, intervenor groups like UCAN must do more than make passionate or inflamatory pleas to the Commission. They must play the game effectively by supporting their views with hard facts, experts analysis, and realistic solutions. Meeting this challenge will not be easy, but, as demonstrated by the Center's efforts in this proceeding, it can be done.

For SDG&E, this order could represent another opportunity to solve problems in cooperation with ratepayers. UCAN, for example, could help alert SDG&E to ratepayer problems before they reach the crisis stage and thereby allow the company to take responsive action. In addition, SDG&E could work closely with UCAN on issues such as the Federal Natural Gas Policy Act where both the company and its ratepayers have a strong interest in keeping gas costs at affordable levels.

To make the most of this opportunity, the management of SDG&E should assume an attitude which is flexible and cooperative toward UCAN. It should recognize that, today, ratepayers must be involved in the regulatory process and any effort real or perceived to obstruct such involvement can only increase the level of frustration among them. SDG&E can play a leadership role in reducing this frustration.

Finally, even with expert intervenor participation, the Commission Staff will continue to be the indispensable part of our state regulatory process. For all practical purposes, intervenors will serve to only complement the work of our professional staff; they cannot replace it.

H. SAVASAH
Asst. Executive Director
Public Utilities Commission
State of California

/s/ LEONARD M. GRIMES, JR.
Leonard M. Grimes, Jr.,
Commissioner

San Francisco, California
April 6, 1983

APPENDIX I

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

COMMISSIONERS:

Paul L. Gioia, Chairman
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead*
Rosemary S. Pooler*

CASE 28655— Proceeding on Motion of the Commission to Examine Ratepayer Access to Utility Billing Envelopes and the Concept of a Citizens' Utility board.

STATEMENT OF POLICY GOVERNING THE ACCESS OF INTERVENOR ORGANIZATIONS TO THE EXTRA SPACE IN THE UTILITIES' BILLING ENVELOPES

(Issued: May 14, 1984)

BY THE COMMISSION:

INTRODUCTION

In the last decade, as a result of escalating utility prices, consumers have expressed concern about the adequacy of consumer representation in the utility regulatory process. To strengthen this representation, the Legislature has provided funding for utility intervention activities to the Consumer Protection Board (CPB)[1] and the Department of Law, and has increased protections for gas and electric consumers. The Consumer Services program at the Department of Public Service also has been expanded.

* Agreeing in part and disagreeing in part with a Separate Statement attached.

[1] Approximately $1.58 million of the Consumer Protection Board's $2.27 million 1984-85 budget is allocated for utility intervenor activities.

In addition to these initiatives, support has emerged for the creation of a Citizens Utility Board (CUB),[2] a not-for-profit, voluntary membership organization with a democratically elected board of directors to represent the interests of residential ratepayers. Under this concept, a CUB would be permitted to use the extra space in utility bill mailings to communicate with ratepayers and solicit membership.

CUBs have developed in three states. Legislation has been enacted in both Illinois and Wisconsin which provides bill envelope access to statewide CUBs and establishes the organizations' structure and purpose. In California, the Public Utilities Commission (CPUC), without legislation, has permitted a CUB access to the bill mailings of San Diego Gas and Electric Company (SDG&E). The CPUC has also allowed a not-for-profit consumer advocacy organization, Toward Utility Rate Normalization (TURN), access to the bills of Pacific Gas and Electric Company (PG&E).

Although legislation has been proposed in New York, the Legislature has not yet enacted a CUB proposal. Consequently, in 1983, Governor Cuomo asked us to consider possible administrative action to facilitate the development of a citizen intervention organization. In response to the Governor's request, staff made a preliminary evaluation of the desirability of developing a CUB in New York and recommended that on balance the benefits to New York's ratepayers appeared to outweigh the possible disadvantages.[3]

Based on staff's preliminary analysis, we concluded that the CUB proposal should be examined more throughly, and

[2] See, Leffler, Robert B. and Rogal, Martin H., *Consumer Participation in the Regulation of Public Utilities: A Model Act*, 13 Harvard Journal of Legislation (February 1976) at 237, in which the authors propose the CUB concept to provide "a vehicle to elicit widespread citizen participation in all government processes concerning utilities, and to provide the financial resources to render that participation effective."

[3] In its analysis, staff found that a well administered CUB might obtain the resources necessary to intervene effectively in the regulatory process; could provide information helpful to consumers; and could assist consumers with complaints. However, staff expressed concern about the need for additional ratepayer representation, given the existing activities of staff, the Consumer Protection Board and the Attorney General, and the possibility that CUB may become embroiled in partisan political activities, reducing its effectiveness.

instituted a proceeding to investigate the concept of a CUB and the feasibility of ratepayer access to the utilities' bill envelopes. To help focus the parties' comments, we issued proposed guidelines developed by staff with our commentary on the issues which we felt warranted particular attention. We sought comments on such issues as the need for such an organization; its purposes, structure, board selection process; and the access issue and encouraged parties to submit comments, recommend modifications, or propose different guidelines.

In response to our order, 64 parties submitted comments. Commentors included public officials, consumer groups, unions, utilities and individual consumers. (Appendix I contains a list of commentors.) In addition, over 220 letters on the CUB issue were received.

To further facilitate discussion on the issue of ratepayer access and CUB, we held nine Public Statement Hearings throughout the State.[4] One hundred seventy-five witnesses appeared and expressed their views. (Appendix II contains a list of the witnesses.) Moreover, a special Public Statement Hearing was held in Albany and participants from the utilities, consumer groups, and regulatory agencies from California and Wisconsin were invited.[5] The hearing provided an opportunity for us to discuss with these participants their experiences in implementing and working with a CUB.

In this opinion, we present an analysis of the comments and issues raised in this proceeding. We provide a review of the experiences of other states, and discuss the basis for our decision to grant access, by citizen ratepayer organizations, to the extra space in the utilities' bill envelopes.

[4] Public Statement Hearings were held in Rochester, Buffalo, Syracuse, Binghamton, Hempstead, New York City, Poughkeepsie, Albany and Utica.

[5] The experts who testified at the Albany Public Statement Hearing were: Ralph Nader, consumer advocate; Ness Flores, Chairman of the Wisconsin Public Service Commission; Leonard Grimes, President of the California Public Utilities Commission; Richard Abdoo, Vice President, Wisconsin Electric Power; Kathleen O'Reilly, Director of the Wisconsin CUB; Robert Fellmeth, California CUB organizer; Sylvia Siegel, Director of TURN; and John Phillips, California CUB organizer.

II. OTHER STATES

A. California

The California Public Utilities Commission (CPUC) is the only Commission in the country which has taken administrative action to facilitate the development of citizens ratepayer organizations by giving them access to the utility bill envelopes. In 1981, the CPUC ruled in a PG&E rate case in response to a petition of TURN, a consumer advocacy organization, that the extra space in PG&E's bill envelopes belonged to the ratepayers since the cost of the envelopes and postage was included in the utilities' revenue requriement. The CPUC defined "extra space" as the space remaining in the billing envelope after the inclusion of the monthly bill and any required legal notices up to a weight that does not require additional postage. The CPUC considered several possibilities for using this extra space and solicited proposals from interested parties.

In response to CPUC's solicitation, the Center for Public Interest Law proposed using the bill inserts of SDG&E to solicit funds to establish a voluntary, not-for-profit consumer organization, to be called the San Diego Utility Consumer Action Network (UCAN). UCAN's organizers modeled their organization on the CUB concept. As proposed, UCAN would intervene in SDG&E's cases only on behalf of residential or small business consumers, assist consumers with complaints, and provide informational services.

The CPUC granted UCAN access to SDG&E's excess space on a trial basis, four times a year for two years. In making this determination, the CPUC held that consumer participation in Commission proceedings is valuable because it ensures a full and complete record, and that UCAN would provide enhanced consumer participation without using tax dollars.[6] The CPUC also found the UCAN proposal desirable because it would benefit "the greatest number of ratepayers

[6] California does not have large scale participation in utility regulatory proceedings by state agencies. Testimony of President Grimes, Albany Public Statement Hearing (January 26, 1984) at 49.

and not just certain individuals or interest groups," through its low-cost membership ($4) and a democratic election of a board of directors.[7] Since distribution of its first bill insert in August 1983, UCAN has recruited approximately 60,000 members. It conducted its first election for a board of directors in March 1984.

In December 1983, the California Commission, in response to a petition, ordered PG&E to provide bill envelope access four times a year for two years to TURN. Unlike UCAN, TURN is an established organization which has been actively involved in PG&E's rate cases for the past 10 years. Its board is comprised of representatives of various consumer organizations in the state. In granting TURN access, the CPUC stated that TURN is a properly constituted not-for-profit corporation, has demonstrated an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population, and is unable to participate in all regulatory proceedings of PG&E without significant financial hardship.[8] PG&E has petitioned the CPUC for a rehearing in the case, and access has been stayed pending a decision.

The CPUC has also received petitions from TURN and a consortium of California Groups[9] asking for access to the Pacific Telephone and Telegraph (PT&T) billing envelope. The consortium's proposal is also modeled after the CUB concept.

B. Wisconsin and Illinois

Wisconsin and Illinois have CUBs that were established by statute in 1979 and 1983, respectively. The Wisconsin CUB represents residential and farm utility consumers, while the Illinois CUB is limited to residential consumers. The statutes in both states provide for statewide CUBs with democratically elected boards of directors and access to the utilities' billing

[7] *Center for Public Interest Law v. SDG&E*, CPUC Case 82-03-05, (March 11, 1982) at 9.

[8] *TURN v. PG&E*, CPUC Case 83-05-13 (May 31, 1983) at 21.

[9] These groups are: the California Public Interest Research Group, Consumers Union, Common Cause of California, and Consumer Federation of America.

envelopes four times a year.[10] Neither Wisconsin[11] nor Illinois[12] have taxpayer funded agencies with rate case intervention activities of the same level as New York's CPB or Department of Law. (Appendix III provides a comparison of the Wisconsin and Illinois statutes, the California ruling in the SDG&E case, and the CUB legislation proposed by Governor Cuomo in New York.)

III. ANALYSIS

The fundamental question to be addressed by this Commission is whether we should permit access to the utility billing envelopes by consumer groups. If we determine there is a need or benefit to be derived from such access, we must then decide the conditions under which such access is to be granted, and the purpose and structure of any organizations to be granted access. Since the focus of this record has been in the development of CUB-type organizations, these issues are analyzed in that context.

A. Need

The threshold issue which has been the subject of extensive comment is whether there is a need for a CUB in this State in view of the existing intervention activities of Commission staff, the CPB, the Attorney General (AG), and a variety of consumer advocacy organizations.

The CPUC faced the issue of duplication of its own staff's efforts and found that "the participation by consumer groups tends to enhance the record in our proceedings and complement the efforts of our Commission staff."[13] Similarly,

[10] The Illinois CUB is still in its embryonic stage, although the interim board must hold its first election by December 1984. The Wisconsin CUB has enlisted approximately 90,000 members, out of 4 million eligible members each of whom pay a $3 membership fee.

[11] Testimony of Ness Flores, Chairman, Wisconsin Public Service Commission, PSC Public Statement Hearing (January 26, 1984) at 93.

[12] Illinois has a public advocate who occasionally represents individual consumers who have utility problems. Telephone interview with Ellen Craig, Special Assistant for Consumer Affairs to Gov. James R. Thompson, Illinois (February 8, 1984).

[13] *TURN v. PG&E, supra* at 22.

Chairman Flores of the Wisconsin Public Service Commission (WPSC), testified that CUB provides a worthwhile mechanism for grassroots intervention in the regulatory process.[14] CPUC's President and WPSC's Chairman stated that citizen organizations provided an additional perspective to their staffs', whose purpose was to represent a broader public interest.

CUB proponents, such as the CPB, New York Public Interest Research Group (NYPIRG), and the Public Utility Law Project (PULP), maintain that CUB will enable individual consumers to pool their resources to participate effectively in Commission proceedings and supplement existing intervention efforts. They contend that the budgets of existing consumer groups are insufficient to intervene consistently and that governmental advocates are often limited by institutional, fiscal or political constraints.[15] Ralph Nader points out that CUB offers consumers a non-governmental mechanism to "redress the imbalance of power between utilities and consumers" without imposing additional costs on those who wish not to participate.[16] Further, CUB supporters suggest that even if CUB has minimal impact on rates, "by giving consumers an official, privately controlled voice, their frustration can find constructive ventilation and articulation."[17]

Those who oppose granting access to a CUB-type organization, principally the utilities, the International Brotherhood of Electrical Workers (IBEW),[18] and the Business Council of New York State,[19] argue that CUB would serve only to duplicate the

[14] Chairman Flores commented that Wisconsin does not have an active governmental intervenor but that even if such an entity did exist, it would be a "proxy advocate" distinguishable from a CUB which is a citizens organization. Flores, *supra*, at 93.

[15] NYPIRG points out that five utilities in the State spent over $6 million on lobbying and intervention efforts.

[16] Testimony of Ralph Nader, PSC Public Statement Hearing, Albany (January 26, 1984) at 17.

[17] Testimony of Lt. Governor Del Bello, PSC Public Statement Hearing, New York City (January 17, 1984) at 12.

[18] The IBEW argues that if CUB is created, "at the very least there should be a substantial reduction in funding for or even an elimination of the CPB and AG's utility intervention unit." Written comments, December 12, 1983.

[19] Written comments of the Business Council of New York State, December 23, 1983, at 2.

representation already provided to ratepayers by the Commission's staff, the CPB, the AG and private groups, and would increase the cost of the regulatory process, which is borne by ratepayers. In addition, the utilities contend that CUB will be unable to affect utility rates because major components of a utility's bill such as inflation, interest rates, taxes, and fuel costs are largely beyond the utilities' control. Therefore, they argue that CUB will serve only to raise false expectations among consumers. IBEW further contends that residential ratepayers are already well represented, pointing out that they are subsidized by commercial and industrial ratepayers. It maintains that if residential ratepayers continue to receive preference, businesses and jobs will leave New York. The Business Council also believes that establishment of a CUB would send a negative signal to the State's businesses.

In examining the need issue, we have considered whether a CUB will offer consumers a meaningful way to voice their concerns in the regulatory process. In this proceeding, individuals and consumer groups have uniformly expressed both concern about the impact of utility rates on consumers and skepticism about the ratesetting process. Thus, we find that while existing groups may adequately represent consumer views,[20] CUB may offer consumers a way to become directly involved in regulatory issues and, as a result, help to increase their confidence in the regulatory process. Further, given the voluntary nature of a CUB, it may offer these potential benefits without imposing additional costs on taxpayers.

B. Purpose

Staff's proposed guidelines provided that the primary objective of a CUB would be to represent small business and residential consumers before regulatory agencies, assist in handling individual consumer complaints, and educate ratepayers about utility issues. We encouraged commentors to focus on whether CUB should represent small businesses as well as residential ratepayers and whether its activities should be limited to regulatory proceedings.

[20] In New York, unlike in Wisconsin, Illinois and California, government agencies regularly intervene in Commission proceedings.

1. Constituency

The scope of a CUB's constituency varies in each state. In California, UCAN proposed to represent residential and small business consumers. The CPUC accepted the proposal, leaving the definition of small business to the CUB board so long as it included businesses that could not be expected to represent themselves.[21] In the PG&E proceeding, the Commission allowed TURN to represent residential consumers. The Wisconsin law requires CUB to represent residential and farming consumers, while the Illinois statute mandates representation for residential consumers only. The Governor's Program Bill in New York similarly limited CUB representation to residential consumers.

Consumer groups generally contend that CUB should represent only residential consumers.[22] These groups maintain that such a limitation is necessary to avoid conflicts of policy and that, particularly in the area of rate design, the interests of residential and small business consumers conflict. Small business representatives appear to share this concern. Assemblyman Robin Schmminger, Chairman of the N.Y.S. Assembly Subcommittee on Small Business, supports the exclusion of small businesses stating that "these are two very divergent groups and a singular CUB may not be able to fully represent the interests of either."[23] And, subsequent to the initiation of this proceeding, Assemblywoman Mae Newburger, one of the primary sponsors of the original CUB legislation, introduced a bill[24] which would establish a CUB for small businesses in the State.[25]

[21] UCAN defined small businesses as those having less than 150 employees and an annual gross income of less than $2 million.

[22] See written comments of NYPIRG, CPB, PULP, N.Y.S. Assemblymembers Mae Newburger, Rhoda Jacobs and Ralph Goldstein.

[23] Written comments of N.Y.S. Assemblyman Robin Schimminger, Subcommittee on Small Business, dated December 14, 1983.

[24] New York State Assembly Bill 10102, by Newburger, *et al.* An Act Creating the Small Business Utility Board, Inc., March 6, 1984.

[25] On April 2, 1984, the Small Business Advisory Board of the N.Y.S. Department of Commerce in a letter to Secretary Kelliher recommended "that Small Business Utility Board(s) be authorized on a regional basis by utility service area."

While inclusion of small businesses in the CUB mandate has not been strongly advocated, the New York State Gas Group suggested that CUB should represent both classes of ratepayers, and the Owners' Committee on Electric Rates proposed that CUB be required to represent large commercial users as well, arguing that residential consumers should not receive preferential treatment.

In deciding this issue, we are concerned whether the views of small businesses are adequately represented in regulatory proceedings; nevertheless, we are also concerned whether the extension of membership to both residential and small business consumers may interfere with the organization's effectiveness. Given our intent that CUB should have the flexibility to establish its own program, we believe that the decision concerning small business representation should be left to CUB's organizers, as was done in California.[26]

2. Consumer Complaints & Outreach Programs

Our original order also invited discussion of whether CUB should be required to handle individual consumer complaints and provide educational information to ratepayers. While the CPUC stated that it did not know if the consumer complaint aspect is necessary, it found that CUB could best decide the issue based on its own experiences. Wisconsin and Illinois statutes do not require that the organizations resolve consumer complaints. In Wisconsin, however, assistance is provided to individuals with consumer complaints.[27] In each state, the CUB's functions include outreach.

Differing viewpoints were presented on whether the CUB should be directed to handle complaints. The Energy Association and NYPIRG both stated that individual complaint

[26] Proposals involving small business membership should contain a definition of small business which includes such businesses that do not have the resources to adequately represent themselves.

[27] At the Albany Public Statement Hearing, Kathleen O'Reilly, Director of the Wisconsin CUB, testified that handling utility complaints was beneficial in that it identified problem areas and provided individual assistance, and that outreach was a valuable CUB function. Ms. O'Reilly testified that CUB handled about 1,500 complaints in 1983, referring them either to the utility or the PSC staff. Testimony at Public Statement Hearing, Albany (January 26, 1984) at 146.

resolution was properly within the purview of a CUB, pointing out that it would enable CUB to assist its membership.[28] NYPIRG also stated that by handling complaints, CUB could identify problem areas. On the other hand, Assemblymembers Jacobs and Newburger, New York Telephone Company and the New York City's Department of Consumer Affairs, would not require CUB to handle consumer complaints. These parties cited the existence of Commission staff and contended that complaint handling would divert CUB's resources from its primary goal of intervention and advocacy.[29] In addition, a number of State agencies have energy related outreach programs. Given these existing programs, we have concluded that it is preferable to allow the organization to determine for itself whether complaint handling and consumer outreach are necessary to meet the needs of its members.

3. Intervention and Lobbying

In defining the scope of CUB's activities, the Commission requested that parties address the issue of whether CUB's purposes should be limited to regulatory intervention or should include lobbying as well. We expressed concern that lobbying may divert resources and interfere with effective intervention efforts. President Grimes testified that the California Commission has not confronted the lobbying issue in the UCAN or TURN cases.[30] In the Wisconsin and Illinois statutes and New York's Governor's Program Bill, lobbying is permitted.

Most consumer representatives strongly oppose restricting CUB's activities to regulatory matters.[31] They argue that lobbying is an important vehicle for affecting energy policy and

[28] The Energy Association stated that, "Assisting consumers with complaints might provide the greatest benefit of all. Were these activities not to be implemented CUB would quickly be viewed as simply a clever mechanism for raising funds." Written comments of the Energy Association, December 23, 1983, at 19. Written comments of NYPIRG, December 23, 1983, at 11.

[29] Assemblymember Jacobs pointed out that the Consumer Services Division of the Public Service Department handles complaints and is doing "an excellent job of educating consumers . . . [and that] CUB should advocate and intervene in rate cases." Written comments dated December 23, 1983, at 2.

[30] Testimony of President Grimes, *supra* at 64.

[31] Written comments of NYPIRG, NYS CPB, PULP, NYS Assemblymembers Newburger, Jacobs and Goldstein.

that CUB should have such powers in view of utility lobbying efforts. And the Center for the Study of Responsive Law pointed out that as a non-profit organization, CUB would be subject to federal and state lobbying restrictions and additional limitations were therefore unnecessary.[32] The Energy Association and New York Telephone Company support restrictions on lobbying activities. They contend that such activity would undermine the CUB's goal of being independent from political pressures.

Again, we believe that the CUB board should be responsible for developing the organization's programs and that the decision to participate in lobbying activities is best left to the CUB board, particularly in view of applicable expenditure limitations.

With respect to the organization's programs this proceeding has convinced us that CUB should determine the programs and priorities necessary to fulfill its purpose to be an independent consumer voice.[33] However, we are concerned that the membership be fully aware of the organization's priorities and that the organization has established standards against which its performance may be measured. Thus, we are requiring that the CUB board submit an annual plan setting forth the percentage of revenues projected to be spent on its intervention, lobbying, outreach and complaint and other programs.[34]

C. Structure of the Organization

The issue which has been the subject of widespread commentary concerns the structure of the proposed organization.[35] The Commission in its order requested consideration of whether the organization should be organized on a Statewide,

[32] This organization submitted comments with New York Statewide Senior Action, the Environmental Planning Lobby, the Democracy Project, and the Telecommunications Research and Action Center.

[33] However, consistent with the legislation in Wisconsin and Illinois, the Governor's program bill and the CPUC decision, we will prohibit the organization from contributing to political campaigns.

[34] We express serious concern about using resources for purposes out-of-state other than lobbying and intervention activities.

[35] Staff's guidelines followed the statutes in Wisconsin, Illinois, California and the Governor's Program Bill, and provided that CUB shall be a not-for-profit organization. No commentor took issue with this position.

regional or utility-specific basis, and which structure would provide the most effective ratepayer representation.

The experience of other states is of interest. The Wisconsin and Illinois legislatures created single, statewide organizations. Kathleen O'Reilly, Executive Director of the Citizens Utility Board in Wisconsin, commented that, "Maximum effectiveness is achieved when a group has an overview of the entire state and all of the major utilities in order to maximally contribute to policy decisions."[36] In California, the Commission approved access to intervenor organizations on a utility-specific basis. President Grimes in his testimony contended that this method is preferable because it would be more likely to attract members by focusing on matters involving their utility.[37] However, President Grimes also stated that, "if a statewide group made the same application a local group did, we'd have to consider it on the same basis.[38] The Governor's Program Bill proposes a Statewide CUB.

Advocates of a statewide CUB maintain this type of structure would provide the strongest representation for consumers.[39] They point out that a statewide organization would be assured a larger population base from which to solicit members and funds, and would benefit economically from the use of a single central staff. Further, they contend that it would prevent confusion among utility ratepayers since there would be no overlapping of CUB jurisdictions. It would also prevent diffusion of resources by eliminating the need for consumers to join, and pay membership fees to, several CUBs in order to ensure their representation in telephone, electric, gas and water utility proceedings. Finally, they contend that a statewide CUB would provide a more integrated and comprehensive approach to utility energy policy.

[36] O'Reilly, *supra*, at 127.

[37] President Grimes also pointed out that the positive elements of a statewide CUB could be achieved through voluntary coordination among the utility groups, Albany Public Statement Hearing (January 26, 1984) at 57.

[38] Grimes, *supra*, at 63.

[39] The CPB, the N.Y.S. Secretary of State, the N.Y.S. Assembly, Ralph Nader, and consumer groups such as NYPIRG have all endorsed the concept of a statewide organization.

Two proposals have been offered as a means to structure a statewide CUB. A majority of those who support a single CUB endorse the structure described in the Governor's Program Bill. Under this plan, CUB board members would be elected from congressional districts, one member per two contiguous congressional districts. Supporters of this approach believe that congressional districts are the best geographical unit from which to elect a board because they are independently and equitably drawn, familiar to the voters, and updated every 10 years. To provide for more utility specific representation, however, Westchester Legal Services, Westchester County Legislator Paul Feiner, and Rochester Group 14621 would prefer electing board members on a utility franchise basis. Under this proposal, each utility franchise area would have a representative(s) on the statewide board.

Opponents of the single statewide CUB approach, such as Warren Anderson, President of the Senate, Assembly Minority Leader Clarence Rappleyea, Assemblyman Thomas Barraga, Manhattan Borough President Andrew Stein, The New York City Department of Consumer Affairs and the Niagara Frontier Consumer's Association believe that New York State's diversity in geography and population make a single statewide CUB unrealistic. They argue that it would be impractical for a statewide CUB to reach a consensus on issues such as the allocation of hydro power, and this may impede CUB's effectiveness. In addition, proponents of more than one CUB contend that fundraising may be easier since solicitation efforts would be targeted to the consumers served by a particular utility.[40] They do not believe, as statewide CUB advocates have suggested, that a CUB's activities would be fragmented; instead they believe that such a CUB would be more effective since its efforts would be directed toward one utility or region.

Supporters of multiple CUBs have made three proposals. Assembly Minority Leader Rappleyea, Assemblymen McCann and Miller, the Borough of Manhattan, and the New York Farm Bureau support regional CUBs that represent the service territories of New York's major power companies. Under the

[40] There may be some merit to this argument. UCAN has recruited over 60,000 CUB members in less than six months. The Statewide Wisconsin CUB has recruited 92,000 CUB members in three years.

Rappleyea plan, the regional CUBs would be serviced by a single, central staff.[41] New York Telephone and the New York Telephone Association, although opposed to CUB on legal and need grounds, support CUBs organized along industry lines. By organizing CUBs in this manner, they believe the organizations will develop the expertise necessary to understand issues relevant to the different utility industries. Finally, Assemblyman Goldstein has offered upstate/downstate CUBs as an alternative if the Commission chooses to have more than one CUB.

The arguments on both sides of this issue have merit. A reasonable approach to the competing concerns may be the development of a statewide organization which has a mechanism for ensuring regional representation. This structure would most likely be able to marshal the resources necessary to undertake effective representation of its members, allocate such resources in an efficient manner, and at the same time, ensure that local concerns are properly addressed. While a statewide structure may be preferable, in light of the serious questions which are posed by the granting of an exclusive privilege to any one private ratepayer organization, we will not preclude the submission of other applications (see later discussion).

D. The Interim Board of Directors

1. Selection

Since CUB would be a new organization with an elected board, it is necessary for an initial group to lay the groundwork to start up the organization. This interim board will play a significant role in shaping the direction of the organization. It will perform such important tasks as preparing the initial bill inserts and conducting the first election.[42] For this reason, the

[41] Assemblyman Rappleyea proposed that each regional CUB have the authority to intervene in telephone and water proceedings. Assemblyman Rappleyea also proposed a separate CUB for municipal electric companies and rural cooperatives, while the Borough of Manhattan proposed an additional CUB for New York Telephone. Written comments of Clarence Rappleyea, October 11, 1983, at 4. Written comments of the Borough of Manhattan, December 23, 1983, at 3.

[42] We consider that the interim board will be involved only in the initial organization activities, including membership solicitation and conduct of the first election. It will not engage in direct membership representation.

Commission sought comments on the selection method, the term of appointments and the function of such a group.

The method of selection in California differs from that in Wisconsin and Illinois. In Illinois and, as proposed in the Governor's Program Bill, the interim board is appointed by the Governor from lists submitted by legislative leaders. In Wisconsin, consent of the Senate was also required. In California, UCAN requested that the Commission appoint the interim board, but the CPUC refused. Regarding this refusal, President Grimes at the Albany hearing stated, "The Commission just feels. . . it would be. . . out of order. . . . I don't know how we can form them (CUB) and flatter them along, and on the other hand deal with them in rate cases.[43] UCAN's organizers appointed a "blue ribbon" board that included the Mayor of San Diego.

Consumer groups offer different proposals for selecting the interim board. Richard Kessel, head of the CPB, called for gubernatorial appointment of the board; the Borough of Manhattan recommended that the CPB appoint the board; the Center for the Study of Responsive Law called for Commission appointment; and NYPIRG suggested that a coalition of consumer groups constitute the interim board.

The issue of selection of the interim board presents competing considerations. To ensure the initial success of the organization, it is important that the board be composed of responsible and knowledgeable members. Thus, we could choose the members; however, as suggested by President Grimes, this may result in interference with the organization's independence. We could follow California's approach and allow CUB's proposers to choose the board. In this case, however, certain consumer interests may be underrepresented. Finally, we could suggest that appointments be made as provided in the Governor's bill. Government intervention in the appointment process may, however, detract from the organization's independence.

After weighing the arguments, we are convinced that the organizers should choose the board to ensure its independence

[43] Grimes, *supra* at 71.

from government intervention. We will require, however, that the board be representative of the consumer interest the organization purports to represent.

2. Initial Funding

Another issue associated with the organization's start-up is the need for an initial funding mechanism. Seed money was not provided to the Wisconsin CUB or proposed in the Governor's bill. In Illinois, the legislation provided for the Illinois Commerce Commission to lend the interim board funds for start-up activities which must be repaid within 24 months. A $100,000 interest-free loan was made to the newly appointed interim board. In California, UCAN took out a loan to fund its initial printing and administrative costs. Consumers Union, Syracuse's Urban Ministry Board, and Assemblyman Ralph Goldstein have proposed that the Commission or the CPB supply CUB with seed money. The California experience suggests that a CUB organization has the ability to obtain start-up funding without Commission or legislative intervention, and we see no need to address this issue.[44]

It has been widely suggested that once the interim board has been formed and has begun to solicit members and money, it attain some requisite membership and contribution levels before it calls for the election of the first board.

The Wisconsin statute required that the first election for the CUB board be held once CUB's membership reached 1,000 members, with at least 50 members in each district, and after CUB had solicited $10,000 in contributions. The Wisconsin CUB had five years to obtain these memberships and contribution levels. The CPUC gave UCAN one year to recruit the 3,500 members and $15,000 in contributions necessary to conduct the elections for the first board. The Illinois CUB has three years to enlist 10,000 members. The Governor's bill calls for the election of the first board once CUB membership reaches 25,000 with at least 100 members in each utility district.

[44] Over 60,000 customers joined UCAN after only two bill inserts. This contribution level provided UCAN with the resources to pay its initial debts in a timely manner.

Under the bill, the interim board would have up to two years to obtain the prescribed membership and contribution levels.[45]

With the exception of the utilities, the parties commenting on this question endorsed the minimum figures for members in the Governor's bill. Although there appears to be considerable support for these levels, we are concerned that they may be insufficient. For instance, assuming a $4 membership fee, if only the minimum number of members were recruited, CUB would have an operating budget of $100,000. According to Kathleen O'Reilly, the Wisconsin CUB has a budget of $600,000. New York's utilities provide service to almost four times as many customers as the companies in Wisconsin's. With this comparison in mind, a CUB which is able to recruit only the minimum number of members suggested by most parties may not have a solid financial base on which to operate. We have decided to allow the CUB organizers to recommend a minimum number of members, provided that they demonstrate that the organization will have sufficient resources to implement an effective program.

3. Eligibility for Elected Board

The final issue relating to the interim board is whether interim board members should be prohibited from seeking election to the first board. Comments on this question varied. The Wisconsin statute prohibited interim board appointees from competing in the first board election. Illinois and CPUC imposed no such restriction, nor did the legislation proposed by the Governor.

PULP and the Center for the Study of Responsive Law believe that interim board members should not be able to seek election to the first board in view of conflict of interest considerations. Assemblywoman Newburger and the Borough of Manhattan disagree and suggest that such a restriction may deter qualified individuals from serving on the interim board.

After consideration of these comments, we find that if interim board members were allowed to seek election to the

[45] For comparison purposes, Wisconsin's utilities provide service to approximately 4 million adult consumers. SDG&E provides service to approximately 1.5 million adult consumers. There are approximately 13 million adult utility consumers in New York State.

first board, the possibility exists that initial policies might be compromised by election considerations. To ensure against possible conflicts of interest, which may interfere with the organization's effectiveness, we have concluded that a limitation on interim board members running for the first board is warranted.

E. Board of Directors

In our draft quidelines, we made several proposals concerning CUB's board of directors that received extensive comment and which merit discussion.

Staff proposed to include *ex-officio* representatives on the CUB board to encourage better coordination with appropriate State agencies. Although the City of New York's Department of Consumer Affairs favored this idea, most parties who commented opposed the proposal,[46] stating that it may interfere with CUB's ability to set its own agenda.[47] While we find that such coordination may be beneficial, it is best left to the CUB board to determine whether *ex-officio* board members or some other method of coordination would be beneficial or interfere with its effectiveness as an independent consumer representative.

Staff also recommended that board members agree not to seek elective office for up to two years after their board term expires. The purpose of this restriction was to prevent the use of CUB board membership for personal or political gain at the expense of the organization's programs. Consumer groups universally objected to this proposal. Assemblywoman Newburger questioned its legality as well. While the concern which the restriction is designed to meet may be justified, a prohibition of this nature is too far reaching and should not be required.

[46] See written comments of NYPIRG; Assemblymembers Goldstein, Duane, Sanders, and Newburger; New York Telephone; and the New York Gas Group.

[47] As an alternative to *ex-officio* board representation, the Southern Tier Coalition for Lower Utility Bills and other have proposed a governmental liaison board to facilitate communication between CUB and other consumer advocacy agencies and groups.

In its written comments, PULP proposed that the CUB board include "representation of the special concerns of low-income residential utility consumers."[48] While PULP may have a legitimate concern, we question the prudence of singling out for special representation any one group, and the impact it may have on the election process. A more prudent approach, in our view, is to encourage CUB to implement programs to attract low-income members which we discuss later.

Another issue relating to the board involves eligibility of Commission staff and utility employees for membership on the CUB board. In *Wisconsin and Illinois,* people associated with the utility, elected officials and Commission staff are prohibited from seeking election to the board of directors.[49] The governor's bill also would prohibit such individuals from serving as CUB directors to minimize conflict of interest problems.

The IBEW strongly objects to the exclusion of utility employees as board members. They argue that prohibiting certain members of CUB from seeking election to the policy-making board is discriminatory, and may unduly restrict the members' options to determine who should direct their organization. Consistent with the concept of a CUB, we believe the membership should choose its board without external limitations on who is eligible to serve as long as the membership has full information about the candidates. Thus, we will refrain from excluding groups from board membership, but require full personal and financial disclosure statements from candidates and conflict of interest guidelines.[50]

F. Bill Inserts

The scope of Commission review of the content of the bill inserts is an issue which was widely discussed. Under the proposed CUB guidelines, access would be in the form of bill

[48] Under the PULP proposal, CUB would establish special low-income membership criteria. CUB members who choose to join under this criteria would be entitled to vote for four statewide low-income board representatives.

[49] Each of these states provides that candidates to the board file personal and financial disclosure statements.

[50] We are concerned about unlimited campaign spending and we will require the applicant to specify reasonable limitations on campaign contributions and the amounts which can be expended on a given campaign.

enclosures, which may include a self-addressed envelope for membership contributions. The Commission would review the inserts to ensure compliance with Commission guidelines.

The Wisconsin law gives the Commission responsibility for reviewing the bill inserts. In this regard, Chairman Ness Flores of Wisconsin testified that he preferred not to be involved in such a review unless the information was clearly false or libelous. The California Commission also chose not to review UCAN's or TURN's enclosures.[51] Instead, the CPUC required UCAN and TURN to print a disclaimer[52] and ordered the utilities and the intervenor organizations to work out any difficulties through good faith negotiations.[53] However, the CPUC has stated that it would suspend the organization's access to the bill envelope if a serious problem developed. *In Illinois, the CUB must submit its* bill inserts to the *Illinois Commerce Commission* for approval. In New York, the Governor's bill does not provide for Commission review of the bill inserts. Insert disputes are to be resolved by the CUB and utility, if possible, or by a civil proceeding in circuit court.

The utilities contend that the Commission should review the bill inserts to ensure accuracy. NYPIRG also believes that the Commission should review the inserts to ensure that no information is "clearly false."[54] In addition, the Center for the Study of Responsive Law believes the Commission should review bill inserts for content, not style or tone, but only after a utility requests such a review. Those who oppose Commission review, including the CPB and Assemblywomen Newburger and Jacobs, contend that the Commission should not have the authority to censor CUB material.

[51] According to the CPUC President Grimes, "Our mandate is in the field of utility regulation, not in supervising the conduct of non-profit organizations who ultimately will be coming before us." Grimes, *supra* at 59.

[52] The disclaimer must clearly state that the intervenor organization is not associated with the CPUC.

[53] UCAN and SDG&E have established an arbitration board of six persons of which three were recommended by UCAN and three by SDG&E. When a dispute arises that UCAN and SDG&E cannot resolve, a member of the arbitration board, chosen by lot, will do so.

[54] NYPIRG, *supra*, at 22.

The views of both the California and Wisconsin Commissions are instructive. They argue that to preserve the independence of CUB, Commission interference with its activities should be kept to a minimum, particularly with respect to the content of its communications with its members. We agree and believe that it is incumbent upon the CUB to develop a dispute resolution mechanism designed to make Commission involvement in this process unnecessary. Nevertheless, the Commission is providing the organization with the special privilege of access and, as such, we recognize our responsibility to consider allegations that clearly misleading information is being included in the bill inserts.

G. Membership Criteria

The basis for membership in CUB varies with the different states. In California, small business and residential utility consumers must be at least 16 years old to join UCAN; in Wisconsin, members must be 18 years old; and in Illinois, the membership criteria will be established by the board of directors. Annual fees range from $3 to $5.

Most comments on this issue were general, simply stating that CUB members should be utility consumers, customers or ratepayers. The Center for Study of Responsive Law, however, proposed that membership not be limited to residential *ratepayers*, but should include any residential utility *consumer;* while NYPIRG and Assemblyman Goldstein proposed that CUB members be 18 years old.

We believe that CUB should establish membership criteria that are reasonable given the voting responsibilities involved in membership. Further, to ensure broad representation, we find that membership should be available to utility consumers as well as ratepayers.

In a related matter, the Legal Aid Society suggested that the membership fee structure be such that the poor are not excluded from participation. Rather than imposing any specific requirements in this regard, we will ask the organizers to address the issue of ensuring participation of low income consumers.

Finally, with respect to funding the organization, we are concerned that the organization be truly representative of its membership and, consistent with Illinois and Wisconsin legislation, we will require criteria which place reasonable limitations on funding from sources other than membership fees.

H. Affected Utilities

In defining which utilities should be affected by the activities of the Citizens Utility Board, two questions emerged: (a) Should an organization have access to all utility envelopes regardless of size and revenue, including water companies?, and (b) Should the scope of intervention activities be limited to those utilities that must provide access to their envelopes? Staff proposed that the CUB have the authority to use the bill envelopes of gas, electric or telephone utilities having annual operating revenues of more than $100 million. These include the nine major gas and electric companies, as well as the three largest telephone companies—New York Telephone, Rochester Telephone and Continental Telephone.

The Wisconsin law gave the CUB access to the envelopes of utilities with annual revenues of more than $2.5 million for gas, electric and water, and $1.6 million for telephone. In Illinois, CUB had access to envelopes of all utilities except those municipally owned. The California Commission has handled the question on a case-by-case basis, and the Governor's program bill provided access to all utility envelopes.

Comments received from the parties vary. New York Telephone Company, The Legal Aid Society, the Center for Study of Responsive Law and N.Y.S. Assemblywomen Newburger and Jacobs favored giving access to envelopes of all utilities regulated by the Public Service Commission, claiming that the issues that affect utility consumers are the same regardless of the regulated utility's operating revenue. The Energy Association favored extending access to municipal electric utilities, and the City of New York and CPB would limit access to utilities with annual operating revenues of $50 million and $20 million respectively.[55] Assemblyman Goldstein pro-

[55] None of the comments addressed the fact that the PSC regulates over 450 utility companies, many of them small water companies—several have less than 10 customers. Comments in favor of extending access to water companies failed to provide a compelling reason for the Commission to do so at this time.

posed retaining the $100 million revenue threshold before requiring access.

We note that by limiting access to those utilities with annual revenues of $100 million or more, virtually all utility consumers will be reached by CUB's insert, either through their gas, electric or telephone bill. In fact, some consumers in western New York and New York City may get three inserts in three separate bills. Furthermore, imposing a limitation on the utilities which must provide access need not necessarily imply a limitation on intervention by, or other activities of, CUB. In fact, we recognize that many of the issues decided in proceedings of smaller utilities affect the industry as a whole; therefore, intervention should not be limited to those companies required to give access to billing envelopes. Rather, the priorities—with respect to which matters the organization gets involved in—may best be left to the board and its perception of the needs of the organization's membership. Thus, we believe a limitation to companies with $100 million in revenues is reasonable but leave it to the CUB to determine which cases it should pursue.

I. Access

Together with the issues associated with bill insert content and the existence of extra space in the billing envelope is the issue of the extent to which access should be given. The Commission order sought comments on how many times a year access should be given.

The Wisconsin Legislature initially granted CUB access to the utilities' bill envelopes four times over a 48-month period. A 1983 amendment to the CUB legislation modified the CUB's access rights to four times a year and removed the 48-month access termination provision. In California, the CPUC has granted UCAN access four times a year for two years after which it will review its performance to determine if access should continue. The Illinois Legislature gave the CUB access four times a year, which was proposed as well in New York's Governor's program legislation.

New York Telephone, in its comments on staff's guidelines, proposed that access be given two times a year with biennial review. NYPIRG, Westchester Legal Services and Assemblyman Goldstein sought that access be granted four times a year. Edward J. Rutkowski, County Executive for Erie County, proposed: "CUBs should be allowed the widest possible access... at minimum, twice a year."[56]

In deciding how often the CUB should have access, we have considered what frequency is sufficient to enable CUB to communicate effectively with its members. Also, access criteria should be developed in view of the utilities' regularly scheduled billing cycles to avoid unnecessary administrative costs. In view of the constraints of bimonthly billing in this State, a proposed schedule which may be workable and which may provide sufficient means to communicate is access to every third bill mailing. Nevertheless, we seek CUB proposals on this access issue in view of our concerns. Further, we believe that access should be limited to two years after the election of the first board, pending our review; the review would be based on the criteria which CUB determines is appropriate in its initial application.

J. Open Records and Independent Audit

Although the Commission order requested comments on the nature and extent of independent audit and oversight of the CUB, few individuals or organizations gave specific comments and recommendations on this aspect of the CUB.

The Center for the Study of Responsive Law, the CPB and the Energy Association stated that safeguards should be in place to secure membership control and oversight of CUB. These safeguards should include mandatory regular open meetings of the board of directors, filing of annual reports, and allowances for recall elections of members of the board. The CPB and the Energy Association concurred with the recommendation that an independent audit of CUB should be required on a regular basis.

Because a crucial characteristic of the CUB is its accountability to its members, we will require open meeting procedures, an annual independent audit and a semi-annual report of its activities to the Commission.

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[56] Written comments of Erie County Executive Edward J. Rutkowski, December 22, 1983, at 2.

K. Exclusive Access

During this proceeding, the issue has emerged of whether a single ratepayer organization should be granted exclusive access. In Wisconsin and Illinois, a not-for-profit Statewide membership organization to represent the interest of utility consumers was created by statute. Similar legislation has been proposed in New York. In California, however, the only state which has acted without the benefit of legislation, the Commission declined to limit access to one organization and instead has invited proposals from various consumer organizations. Access has been granted to UCAN, a CUB-type organization, in the SDG&E service territory and TURN, an experienced consumer organization, in the PG&E service territory.[57] President Grimes testified in relation to the reasons for the Commission's approach: "I believe that a policy of minimum intervention is a proper one. Not only does it preserve the independence of the ratepayer organization, but it recognizes the Commission's limited ability and lack of desire in our case to regulate the affairs of such organization."[58]

Concerns have been voiced in this proceeding that without an exclusive right of access, resources may be diffused, leading to ineffective representation. Sylvia Siegel, however, who as director of TURN has extensive experience as a consumer advocate in California's regulatory process, argues that there "should be different models in a diverse state to represent diverse interests effectively,"[59] and that an opportunity to obtain increased funding for their valuable efforts should be provided. She expressed her point of view as follows: "I think the fact that you have other consumer groups who have

[57] Both TURN and a group proposing the development of a CUB-type organization are now seeking access to the Pacific Telephone Company's bill envelopes.

[58] President Grimes' testimony, Albany Public Statement Hearing at 59. President Grimes also pointed out that "Our decisions by themselves do not assure effective rate-payer participation. What they create is unique opportunities for ratepayer advocates to communicate with the ratepaying public and seek financial support for their efforts. Whether sweet success or bitter failure flows from this opportunity will depend largely on the skills, talents and political sensitivity of consumer leaders." Testimony at 62.

[59] Testimony of Sylvia Siegel, Albany Public Statement Hearing at 158.

participated in a meaningful way is important and my urging would be to beef up their resources."[60]

We have also examined the issue of exclusivity in a legal context. The Commission does have broad regulatory authority over the utility operations, but unlike the legislature, it has no power to create a private corporation or to define such a corporation's powers, functions and duties. Moreover, the granting of access to one private ratepayer organization raises serious questions of discrimination under the Public Service Law. It should be noted that one of the Commission's fundamental responsibilities is to avoid and prevent discrimination in favor of or against any individual or group of ratepayers. Thus, while we believe that we have the authority to direct utilities to open their billing envelopes to organizational and fund raising messages necessary to develop non-governmental ratepayer representation, we also find that granting an exclusive right of access to a single organization presents serious legal concerns.

Furthermore, aside from our legal concerns, we are not convinced that offering the important and valuable privilege of access to more than one private ratepayer organization will diminish the effectiveness of such organizations. First, we are not convinced, on the basis of the record before us, that duplication and diffusion of resources will occur. Second, we find California's analysis of this issue persuasive. Further, California's experience thus far suggests that its approach is a valid one. While a single Statewide organization may be preferable and we are prepared to grant access to an acceptable Statewide proposal, we do not believe that we are justified, either on legal or policy grounds, in granting a single ratepayer organization an exclusive right to access. We will, however, reserve the right to coordinate or limit access, should applications by multiple organizations, in fact, prove to be a problem.

[60] Testimony of Sylvia Siegel at 159.

IV. CONCLUSION

Significant public interest has been focused on our proceeding to examine the issue of ratepayer access to the utility bill envelope. Over the past years, support has emerged for the creation of a Citizens' Utility Board in this State. Proposals to create such an organization have been pending in the legislature and the Governor has included a CUB proposal in his legislative program. Further, in October of last year, the Governor asked this Commission to consider possible administrative action to facilitate the development of a Citizens' Utility Board in this State.

In response, we initiated a proceeding to examine the issue of ratepayer access and the concept of a Citizens' Utility Board. The proceeding provided a valuable opportunity to examine the difficult and controversial issues involved with ratepayer access to utility bill envelopes.

We have conducted a thorough review of the record and based on our analysis, have concluded that providing ratepayer access to the bill envelope to facilitate increased utility consumer representation is in the public interest. Further, we find that the Commission has the legal authority to require utilities to open their billing envelopes for this purpose. Thus, we will direct the appropriate utilities to open their billing envelopes to enable a qualifying organization to communicate with consumers and solicit membership and funds.

Finally, we expect to receive an application for a Statewide organization in the near future and it is clear from our opinion that a proposal for a Statewide organization, consistent with our general standards, will be granted access to the utility bill envelopes. For the reasons previously discussed, however, we will not grant an exclusive privilege of access. However, we are very much aware of the concerns that have been expressed with respect to the provision of access to more than one group. We will be monitoring developments in this regard closely and reserve the right to coordinate or limit access if necessary to ensure effective representation of this State's utility consumers.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 28655—Proceeding on Motion of the Commission to Examine Ratepayer Access to Utility Billing Envelopes and the Concept of a Citizen's Utility Board

Separate Statement of Commissioners Anne F. Mead and Rosemary Pooler:

We agree with the major thrust of the majority Statement of Policy in this proceeding. However, we disagree with several of the findings of the majority as follows:

Board of Directors—We disagree with the majority finding that the "membership should choose its board without external limitations on who is eligible to serve as long as the membership has full information about the candidates." We believe that there should be external limitations which would exclude employees, directors and consultants of a public utility doing business in New York State, employees of the Department of Public Service and Power Authority of New York, and elected officials or persons seeking elective office. We believe that such limitations are essential to avoid serious conflict of interest problems and to assure the creation of a citizen controlled Board of Directors.

Bill Inserts—We would limit Commission responsibility to consideration of allegations that clearly false information has been included in the bill insert. The majority would consider "clearly misleading information." This standard invites a plethora of allegations based on subjective opinions as to what is or is not misleading.

Exclusive Access—The primary issue raised in this proceeding is whether to grant exclusive access to a statewide CUB or provide equal access to organizations who meet our guidelines. Although the majority states a preference for a single statewide organization, and are prepared to grant access to an acceptable statewide propo-

sal, they believe that on both legal and policy grounds they are unable to grant exclusive right to access to a single statewide CUB.

We believe there are compelling policy grounds for granting exclusive access.

First, residential consumers as a class have very similar problems. While there may be regional differences, case and issue priorities will have to be determined, regardless of the geographical area of the organization. However, most issues can be agreed upon in a democratically operated organization with effective regional representation.

Secondly, it seems to us that PULP was correct when it stated, "it is not practical to establish CUB on regional or on service territory lines. New York Telephone Company is the dominant exchange service telephone utility. Brooklyn Union Gas and National Fuel Gas are major natural gas utilities whose service territories are different than that of electric utilities that provide service to the same customers. Any regional or utility plan would thus cause inefficient overlapping in several cases by various CUBs and would virtually assure that certain CUBs could not accumulate the resources to hire a quality staff. A regional or utility approach would also create inefficiencies in assuring effective representation in generic proceedings at the Commission. A recent example is the Commission's consideration of marginal cost issues in Phase II of Consolidated Edison, Case #27353. This extended proceeding was conducted in New York City but had implications for customers of each electric utility. Surely it is apparent that only a statewide entity would be appropriate and economically feasible for representing the interests of residential customers."

With respect to the legal issues raised regarding exclusive access, we think the fact that all ratepayers will have equal access to the billing mechanism via a single statewide CUB and through a democratic election process to the Board of Directors, should ease the concern regarding the proscriptions against undue preferences in sections 65(3) and 91(3) of the Public Service Law. In addition, it appears from the legal arguments

raised to date, that First Amendment and Equal Protection issues will not be violated by exclusive access to the billing envelope.

Given the compelling policy reasons for granting exclusive access to a single statewide CUB and the legal arguments presented by the various parties, we would grant exclusive access to an acceptable statewide organization.

Furthermore, the majority has not explained how it would "coordinate or limit access, should applications by multiple organizations, in fact, prove to be a problem." We believe the practical and efficient course of action is exclusive access on a statewide basis.

APPENDIX J

CREATES CITIZENS' UTILITY BOARD TO REPRESENT INTERESTS OF UTILITY CONSUMERS

QUESTION: Should a nonprofit public corporation funded by voluntary contributions be established to represent the interests of utility consumers?

EXPLANATION: Creates Citizens' Utility Board to represent interests of electric, telephone, gas and heating utility consumers before legislative, administrative and judicial bodies, conduct research and investigations. Authorizes Oregon residents contributing $5 minimum to board to vote for members of board. Establishes eligibility requirements and limits contributions and expenditures for board candidates. Authorizes board periodically to include certain materials with utility billings, subject to limited cost reimbursement to utility. Exempts municipallties, cooperatives and people's utility districts.

AN ACT

Relating to public utilities.

Be It Enacted by the People of the State of Oregon:

SECTION 1. The people of the State of Oregon hereby find that utility consumers need an effective advocate to assure that public policies affecting the quality and price of utility services reflect their needs and interests, that utility consumers have the right to form an organization which will represent their interests before legislative, administrative and judicial bodies, and that utility consumers need a convenient manner of contributing to the funding of such an organization so that it can advocate forcefully and vigorously on their behalf concerning all matters of public policy affecting their health, welfare and economic well-being.

SECTION 2. As used in this Act, except as otherwise specifically provided or unless the context requires otherwise:

(1) "Board" means the Citizens' Utility Board of Governors.

(2) "Consumer" or "utility consumer" means any natural person 18 years of age or older who is a resident of the State of Oregon.

(3) "District" means an electoral district for members of the Citizens' Utility Board of Governors.

(4) "Member" means a member of the Citizens' Utility Board.

(5) "Utility" means any utility regulated by the Public Utility Commissioner pursuant to ORS chapter 757, which furnishes electric, telephone, gas or heating service. However, "utility" does not include any municipality, cooperative, or people's utility district.

SECTION 3. (1) The Citizens' Utility Board is hereby created as an independent nonprofit public corporation and is authorized to carry out the provisions of this Act.

(2) The Citizens' Utility Board has perpetual succession and it may sue and be sued, and may in its own name purchase and dispose of any interest in real and personal property, and shall have such other powers as are granted to corporations by ORS 61.061. No part of its net earnings shall inure to the benefit of any individual or member of the Citizens' Utility Board.

(3) The Citizens' Utility Board shall have all rights and powers necessary to represent and protect the interests of utility consumers, including but not limited to the following powers:

(a) To conduct, fund or contract for research, studies, plans, investigations, demonstration projects and surveys.

(b) To represent the interests of utility consumers before legislative, administrative and judicial bodies.

(c) To accept grants, contributions and appropriations from any source, and to contract for services.

(d) To adopt and modify bylaws governing the activities of the Citizens' Utility Board.

SECTION 4. The Citizens' Utility Board of Governors shall manage the affairs of the Citizens' Utility Board. The board

may delegate to an executive committee composed of not fewer than five members of the board the authority as would be allowed by ORS 61.141.

SECTION 5. (1) Within 90 days after the effective date of this Act an interim board of directors shall be appointed by the Governor, subject to confirmation by the Senate in the manner prescribed in ORS 171.562 and 171.565. One director shall be appointed by the Governor, two directors each shall be appointed by the Governor from each list of not more than five names per director position submitted individually by the President of the Senate and the Speaker of the House of Representatives; one director each shall be appointed from each list of not more than five names submitted individually by the majority leader of the Senate and the majority leader of the House and by the minority leader of the Senate and the minority leader of the House.

(2) No person who is a director, employee or agent of any public utility is eligible to be a director appointed under this section. While on the Board, no interim director appointed under this section may hold elective public office, be a candidate for any elective public office or be a state public official. No interim director may be a candidate in the first election under section 6 of this Act. No person who owns or controls, either singly or in combination with any immediate family member, utility stocks or bonds of a total value in excess of $3,000 is eligible to serve as an appointed member of the Citizens' Utility Board of Governors.

(3) Within 120 days after the Citizens' Utility Board has obtained 5,000 members, with a minimum of 100 members in each district, an election shall be held pursuant to section 6 of this Act for selection of the Citizens' Utility Board of Governors.

(4) The board of directors appointed under subsection (1) of this section shall prescribe the procedure for election conducted by mail ballot for the first Citizens' Utility Board of Governors, and shall establish bylaws regarding campaign contributions and expenditures for election to the Citizens' Utility Board of Governors. In no case shall such contributions or expenditures exceed $1,000 and in no case can a candidate

accept more than $250 in campaign contributions from any one contributor. In addition, no candidate shall accept campaign contributions from a utility, municipality, cooperative, or people's utility district.

SECTION 6. (1) The Citizens' Utility Board of Governors shall be comprised of three persons elected from each congressional district described in ORS 188.130 by a majority of the votes cast by members residing in that district. The election shall be conducted by mail ballot in such manner as the Citizens' Utility Board of Governors may prescribe.

(2) The term of office of a member of the Citizens' Utility Board of Governors is four years. No person may serve more than two consecutive terms on the Citizens' Utility Board of Governors.

(3) Each candidate and each member of the Citizens' Utility Board of Governors must be a member of the Citizens' Utility Board and must be a resident of the district from which the candidate seeks to be or is elected.

(4) At least 45 days before an election each candidate shall file with the Citizens' Utility Board of Governors a statement of financial interests, which shall contain the information in such form as the Citizens' Utility Board of Governors shall determine. Each candidate shall maintain a complete record of contributions received and expenditures made with regard to an election campaign. Each candidate shall make the records available for public inspection at such reasonable times as the Citizens' Utility Board of Governors considers appropriate.

(5) No member who is employed by a utility shall be eligible for appointment or election to the Citizens' Utility Board of Governors, and no member of the Citizens' Utility Board of Governors who obtains employment by a utility may maintain a position on the Citizens' Utility Board of Governors. While on the Board, no director elected under this section may hold elective public office, be a candidate for any elective public office, or be a state public official. No person who owns or controls, either singly or in combination with any immediate family member, utility stocks or bonds of a total value in excess

of $3,000 is eligible to serve as an elected member of the Citizens' Utility Board of Governors.

(6) The Citizens' Utility Board of Governors may disqualify any candidate or member of the Citizens' Utility Board of Governors for any violation of this Act or of the bylaws of the Citizens' Utility Board.

(7) Upon petition signed by 20 percent of the members in a district for the recall of a member of the Citizens' Utility Board of Governors elected from the district, the Citizens' Utility Board of Governors shall mail ballots to each member in the district, submitting the question whether the member of the Citizens' Utility Board of Governors shall be recalled. If a majority of the members voting at the election vote in favor of the recall, then the member of the Citizens' Utility Board of Governors shall be recalled. Elections and recall proceedings shall be conducted in a manner as the Citizens' Utility Board of Governors may prescribe. Ballots for all election and recall proceedings shall be counted at a regular meeting of the Citizens' Utility Board of Governors.

(8) The remaining members of the Citizens' Utility Board of Governors shall have the power to fill vacancies on the Citizens' Utility Board of Governors.

SECTION 7. (1) Notwithstanding the term of office specified by subsection (2) of section 6 of this Act for members of the Citizens' Utility Board of Governors, of the members first elected from each district:

(a) One shall serve for a four-year term.

(b) One shall serve for a three-year term.

(c) One shall serve for a two-year term.

(2) For the purpose of determining the length of a term of a member pursuant to subsection (1) of this section, the length of the term of each member from a district shall be based upon the number of votes received by the member, with the member who receives the most votes in each district serving for the longest term and the member who receives the fewest votes serving for the shortest term.

SECTION 8. All meetings of the board shall be open to the public, except under the same circumstances in which a public agency would be allowed to hold executive meetings under ORS 192.660.

SECTION 9. *(1)* All consumers are eligible for membership in the Citizens' Utility Board. A consumer shall become a member of the Citizens' Utility Board upon contribution of at least $5 but not more than $100 per year to the Citizens' Utility Board. Each member shall be entitled to cast one vote for the election of the board. The board shall establish a method whereby economically disadvantaged individuals may become members of the Citizens' Utility Board without full payment of the yearly contribution.

(2) Each year the Citizens' Utility Board shall cause to be prepared, by a certified public accountant authorized to do business in this state, an audit of its financial affairs. The audit is a public record subject to inspection in the manner provided in ORS 192.410 to 192.500.

SECTION 10. *(1)* Upon request by the Citizens' Utility Board pursuant to this section, each utility shall include in billings to a utility consumer materials prepared and furnished by the Citizens' Utility Board, not exceeding in folded size the dimensions of the envelope customarily used by such utility to send billings to its customers.

(2) The Citizens' Utility Board shall not intentionally make any false material statement in any material submitted to a utility for inclusion with a billing. If the utility believes that the Citizen's Utility Board has intentionally made false material statements in an enclosure, it may file a complaint with the Public Utility Commissioner of Oregon within five days of receipt. The Public Utility Commissioner of Oregon must review the complaint within ten days, and if the Commissioner determines that the Citizens' Utility Board has intentionally made false material statements, the commissioner shall give the Citizens' Utility Board of Governors written notification that specifies any false material statements made and the reasons why the Commissioner determines the statements to be false.

(3) No utility shall be required to enclose Citizens' Utility Board material with a billing more than six times in any calendar year.

(4) The Citizens' Utility Board shall notify a utility of its intention to include under the provisions of this Act any material in any specified periodic billing or billings not fewer than 30 calendar days prior to the mailing of the periodic billings and shall supply the utility with the material not fewer than 20 calendar days prior to the mailing of the periodic billings.

(5) All material submitted by the Citizens' Utility Board for inclusion in a utility billing must include the return address of the Citizens' Utility Board. A utility is not required to deliver or forward to the Citizens Utility Board material intended for the Citizens' Utility Board mistakenly sent to the utility. However, a utility shall retain such materials for a period of 60 days from the date of receipt. The utility shall notify the Citizens' Utility Board that such materials have been received and make these materials available to the Citizens' Utility Board on demand.

SECTION 11. *(1)* The Citizens' Utility Board shall not be required to pay any postage charges for materials submitted by the Citizens' Utility Board for inclusion in a utility billing if such materials weigh four-tenths of one ounce avoirdupois or less. If the materials submitted weigh over four-tenths of one ounce avoirdupois, then the Citizens Utility Board shall reimburse the utility for a portion of the postage costs which is equal to that portion of the Citizens' Utility Board material over four-tenths of one ounce avoirdupois in proportion to the total weight of the billing. In addition to postage costs, the Citizens' Utility Board shall reimburse such other reasonable costs, as determined by the Public Utility Commissioner of Oregon, incurred by a utility in complying with section 10 of this Act.

(2) Reimbursement of a utility by the Citizens' Utility Board shall be made within 60 days of the date the utility submits to the Citizens' Utility Board an itemized statement of the costs incurred by the utility. In no event shall such reimbursement exceed the fair market value for the services provided by the utility.

SECTION 12. *(1)* No utility, nor any of its employes, officers, members of the board of directors, agents, contractors or assignees, shall in any manner interfere with, delay, alter or otherwise discourage the distribution of any material or statement authorized by the provisions of this Act for inclusion in periodic utility billings, nor in any manner interfere with, hamper, hinder or otherwise infringe upon a utility consumer's right to contribute to Citizens' Utility Board, nor in any manner hamper, hinder, harass, penalize or retaliate against any utility consumer because of the consumer's contribution to, or participation in, any activities of the Citizens' Utility Board.

(2) No utility may change its mailing, accounting, or billing procedures if such change will hamper, hinder, or otherwise interfere with the ability of the Citizens' Utility Board to distribute materials or statements authorized by this Act.

SECTION 13. Citizens' Utility Board may submit to the appropriate agency any complaint it receives regarding a utility company. Public agencies shall periodically inform Citizens' Utility Board of any action taken on complaints received pursuant to this section.

SECTION 14. Notwithstanding any other provision of law:

(1) Whenever the board determines that any agency proceeding may affect the interests of utility consumers, Citizens' Utility Board may intervene as of right as an interested party or otherwise participate in the proceeding.

(2) Citizens' Utility Board shall have standing to obtain judicial or administrative review of any agency action, and may intervene as of right as a party or otherwise participate in any proceeding which involves the review or enforcement of any action by an agency, if the board determines that the action may affect the interests of utility consumers.

SECTION 15. *(1)* ORS chapters 278, 279, 282, 283, 291, 292, 293, 295 and 297 do not apply to Citizens' Utility Board or to the administration and enforcement of this Act. An employe of Citizens' Utility Board shall not be considered an "employe" as the term is defined in the public employes' retirement laws.

Citizens' Utility Board and its employes shall be exempt from the provisions of the State Personnel Relations Law.

(2) ORS 183.310 to 183.550 does not apply to determinations and actions by the board.

(3) The board, and any of the officers, employes, agents or members of Citizens' Utility Board shall be provided the same protections from liability as the board, officers, employes, agents, or members of any non-profit corporation of the State of Oregon.

SECTION 16. *(1)* Any utility, and any of its employes, officers, members of the board of directors, agents, contractors or assignees which does, or causes or permits to be done, any matter, act or other thing prohibited by this Act, or omits to do any act, matter or other thing required to be done by this Act, is liable for any injury to Citizens' Utility Board and to any other person in the amount of damages sustained in consequence of such violation, together with reasonable attorney fees, to be fixed by the court in every case of recovery. Such attorney fees shall be taxed and collected as part of the costs in the case.

(2) Citizens' Utility Board may obtain equitable relief, without bond, to enjoin any violation of this Act.

(3) Any recovery or enforcement obtained under this section shall be in addition to any other recovery or enforcement under this section or under any statute or common law. Any recovery under this section shall be in addition to recovery by the state of the penalty or fine prescribed for such violation by this Act. The rights and remedies provided by this Act shall be in addition to all other rights and remedies available under law.

SECTION 17. Willful violation of section 10, parts (1) or (5) or section 12 of this Act is a Class A misdemeanor.

SECTION 18. If any section, portion, clause or phrase of this act is for any reason held to be invalid or unconstitutional the remaining sections, portions, clauses and phrases shall not be affected but shall remain in full force or effect, and to this end the provisions of this Act are severable.

APPENDIX K

PUBLIC UTILITIES—INTERVENOR'S FEES AND EXPENSES—RATESETTING

Senate Bill No. 4

CHAPTER 297

An act to add Article 5 (commencing with Section 1801) to Chapter 9 of Part 1 of Division 1 of the Public Utilities Code, relating to public utilities.

[Approved by Governor July 5, 1984. Filed with Secretary of State July 6, 1984]

LEGISLATIVE COUNSEL'S DIGEST

SB 4, Montoya. Public utilities: intervenors.

Under existing law, the jurisdiction and control over public utilities, including electrical, gas, telephone, telegraph, and water corporations, is vested in the Public Utilities Commission, including the power to fix rates and charges and to specify the terms and conditions under which service is furnished.

This bill would state the intent of the Legislature to confirm the authority of the commission to make awards to participants in proceedings of the commission commenced on or before December 31, 1984, pursuant to the commission's rules and regulations, and to require that awards in proceedings commenced on and after January 1, 1985, be governed by this bill.

The bill would authorize the commission to award reasonable advocate's fees, expert witness fees, and other costs of participation or intervention in any hearing or proceeding for the purpose of modifying a rate or establishing a fact or rule that may influence a rate to any customer of an electrical, gas, telephone, telegraph, or water corporation meeting the bill's requirements regarding substantial contribution to the proceeding and financial hardship as a result of participation. The bill would specify how the customer is to make application for an

award and the basis for the commission's determination of the customer's eligibility therefor. The bill would authorize the commission to designate a common legal representative in cases where it finds it appropriate to do so. The bill would direct that any award of compensation ordered by the commission shall be paid by the public utility which is the subject of the hearing or proceeding, and would authorize the public utility to recover through its rates the amount of the award so ordered within one year of the date of the award.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature in enacting this act to confirm the authority of the Public Utilities Commission in proceedings commenced on or prior to December 31, 1984, to make awards to participants pursuant to existing rules and regulations of the commission and to require that for proceedings commenced on and after January 1, 1985, awards to customers shall be made pursuant to this act.

SECTION 2. Article 5 (commencing with Section 1801) is added to Chapter 9 of Part 1 of Division 1 of the Public Utilities Code, to read:

Article 5. Intervenor's Fees and Expenses

1801. The purpose of this article is to provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any hearing or proceeding of the commission for the purpose of modifying a rate or establishing a fact or rule that may influence a rate.

1802. As used in this article:

(a) "Compensation" means payment for all or part, as determined by the commission, of reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of participation or intervention in a hearing or proceeding for the purpose of modifying a rate or establishing a fact or rule that may influence a rate, and includes the fees and costs of obtaining judicial review, if any.

(b) "Expert witness fees" means recorded or billed costs incurred by a customer for an expert witness.

(c) "Other reasonable costs" means reasonable out-of-pocket expenses incurred by a customer not exceeding 25 percent of the total or reasonable advocate's fees and expert witness fees awarded.

(d) "Party" means any interested party, respondent public utility, or commission staff in a hearing or proceeding for the purpose of modifying a rate or establishing a fact or rule that may influence a rate.

(e) "Customer" means any participant representing consumers, customers, or subscribers of any electrical, gas, telephone, telegraph, or water corporation subject to the jurisdiction of the commission; any representative who has been authorized by a customer; or any representative of a group or organization authorized pursuant to its articles of incorporation or bylaws to represent the interests of residential customers, but does not include any state, federal, or local government agency, any publicly owned public utility, or any entity which in the commission's opinion was established or formed by a local government entity for the purpose of participating in a commission proceeding.

(f) "Significant financial hardship" means both of the following:

(1) That, in the judgment of the commission, the customer has or represents an interest not otherwise adequately represented, representation of which is necessary for a fair determination of the proceeding.

(2) Either that the customer cannot afford to pay the costs of effective participation, including advocate's fees, expert witness fees and other reasonable costs of participation and the cost of obtaining judicial review, or that, in the case of a group or organization, the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding.

(g) "Substantial contribution" means that, in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer.

1803. The commission may award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of participation or intervention in a hearing or proceeding for the purpose of modifying a rate or establishing a fact or rule that may influence a rate to any customer who complies with Section 1804 and satisfies all of the following requirements:

(a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.

(b) Participation or intervention without an award of fees or costs imposes a significant financial hardship.

1804. (a) A customer seeking an award under this article shall file, within 30 days of the first prehearing conference or within 45 days after the close of the evidentiary record, and serve on all parties to the hearing or proceeding, a request for finding of eligibility for compensation. In cases where no prehearing conference is scheduled or where the commission anticipates the proceeding will take less than 30 days, the commission may determine the procedure to be used for filing these requests. The request shall include all of the following:

(1) A showing by the customer that participation in the hearing or proceeding would pose a significant financial hardship.

(2) A statement of issues the customer intends to raise in the hearing or proceeding.

(3) An estimate of the compensation that will be sought.

(4) A budget for the customer's presentation.

Within 30 days after service of the request for a finding of eligibility for compensation, the commission may direct its staff to file, and may permit any other interested party to file, a statement responding to the request, including a discussion of the appropriateness of a common legal representative.

(b) The commission shall thereafter issue a ruling determining whether the customer is eligible for an award of compensation. The ruling shall address whether a showing of significant financial hardship has been made and may include a discussion of whether it is determined appropriate to designate a common legal representative pursuant to Section 1805.

(c) Following issuance of a final order or decision by the commission in the hearing or proceeding, a customer who has been found by the commission, pursuant to subdivision (b), to be eligible for an award of compensation may file within 30 days a request for an award. The request shall include, at a minimum, a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding. The request shall be served on all parties to the hearing or proceeding. Within 30 days after service of the request, the commission staff may file and any other party may file, a response to the request.

(d) The commission may audit the records and books of the customer to the extent necessary to verify the basis for the award. The commission shall preserve the confidentiality of the customer's records in making its audit. Within 20 days after completion of the audit, if any, the commission shall direct that an audit report shall be prepared and filed. Any other party may file a response to the audit report within 20 days thereafter.

(e) Within 75 days after the filing of a request for compensation pursuant to subdivision (c), or within 50 days after the filing of an audit report, whichever occurs later, the commission shall issue a decision that determines whether or not the customer has made a substantial contribution to the final order or decision in the hearing or proceeding. If the commission finds that the customer requesting compensation has made a substantial contribution, the commission shall describe this substantial contribution and shall determine the amount of compensation to be paid pursuant to Section 1806.

1805. The commission may, as specified in Section 1804, designate, if determined appropriate, a common legal representative. In cases where the commission designates a common legal representative, no compensation shall be awarded to customers with the same or similar interests who participate or intervene in the hearing or proceeding.

1806. The computation of compensation awarded pursuant to Section 1804 shall take into consideration the compensation paid to persons of comparable training and experience who offer similar services. The compensation awarded may not, in any case, exceed the market value of services paid by the commission or the public utility, whichever is greater, to persons of comparable training and experience who are offering similar services.

1807. Any award made under this article shall be paid by the public utility which is the subject of the hearing, investigation, or proceeding as determined by the commission, within 30 days. Notwithstanding any other provision of law, any award paid by a public utility pursuant to this article shall be allowed by the commission as an expense for the purpose of establishing rates of the public utility by way of a dollar-for-dollar adjustment to rates imposed by the commission immediately on the determination of the amount of the award, so that the amount of the award shall be fully recovered within one year from the date of the award.

1808. The commission shall deny any award to any customer who attempts to delay or obstruct the orderly and timely fulfillment of the commission's responsibilities.

APPENDIX L

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Decision 84-10-062 October 17, 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

COMMITTEE OF MORE THAN 1 MILLION CALIFORNIA TAXPAYERS TO SAVE PROP. 13, a nonprofit tax-exempt organization, *Complainant,* v. PACIFIC GAS & ELECTRIC COMPANY, a California corporation; SAN DIEGO GAS & ELECTRIC COMPANY, a California corporation; SOUTHERN CALIFORNIA EDISON COMPANY, a California corporation; SOUTHERN CALIFORNIA GAS COMPANY, a California corporation; GENERAL TELEPHONE COMPANY OF CALIFORNIA, a California corporation; and PACIFIC BELL, a California corporation, *Defendants.*	**Case 84-10-022 (Filed October 4, 1984)**

ORDER DISMISSING COMPLAINT

On October 4, 1984, the Committee of More Than One Million California Taxpayers to Save Prop. 13 (Committee) filed a complaint requesting access to the extra space in the billing envelopes of the major California energy and telephone

utilities pursuant to Decision (D.) 93887 (as modified by D.82-03-047) and a motion for an ex parte order granting immediate and urgent relief or, in the alternative for a shortening of time for hearing on the complaint.

The Committee states that it is informed and believes that the utility Defendants are members of either the California Round Table or the California Taxpayers Association, both of which are lobbying and/or political action groups consisting of various businesses in California, and that each of these associations has recently adopted resolutions to assess from its members and expend from such assessments substantial sums in opposition to the passage of Proposition 36. The Committee alleges, also on information and belief, that defendants will contribute funds seeking the defeat of Proposition 36, and that these funds are acquired from the monies received from ratepayers by defendants. The Committee is further informed and believes a principal argument to be propounded by the associations is that, if Proposition 36 is passed, it will result in an unreasonable limitation on the ability of public utilities to set rates necessary to meet ongoing variable expenses. The Committee opposes this argument.

The Committee asserts that defendants send a monthly bill packet by first class mail to each of their utility customers. The weight of the bill packet, which includes the mailing envelope and any required legal notices mailed with the bill, is less than one ounce. Because postage is charged in one ounce increments, the difference between the actual weight of the bill packets and the measure of one full ounce constitutes an additional measure of weight or "extra space" in the envelope which may be used at no additional postage charge.

The Committee alleges that defendants presently include inserts of their own in the "extra space" available in the billing envelopes but fail to make it available to ratepayers as required by D.93887 and D.82-03-047.

The Committee alleges that a substantial number of its supporters are ratepayers of the defendants and that all ratepayers of each of the defendants would benefit from accurate information on the possible effects of Proposition 36 on utility rates and services.

The Committee argues that it should be allowed to include informational inserts for the benefit of defendants' ratepayers in the billing envelopes of all defendants which would provide this assessment of the potential effects of Proposition 36 on utility rates. Since supporters of the Committee, who are ratepayers, are the source of the funds which Committee believes will be used to contribute to the campaign in opposition to Proposition 36, Committee should be permitted to use the "extra space" belonging to these ratepayers to counter the political contributions of defendants.

Since the election, in which Proposition 36 will be decided by the voters, takes place on November 6, 1984, Committee asks that defendants be ordered to allow the inserts in this month's (October's) billing envelopes.

Notice of the filing of this complaint appeared on the Commission's Daily Calendar of October 11, 1984. Under ordinary procedures, we would wait at least 30 days to receive answers from each of the defendants and to determine whether there were other parties whose intervention might prove useful in rendering an informed decision on the complaint. However, because of the shortness of time before the election, and so that Committee might know where it stands with respect to its complaint and can redirect its resources accordingly, we are taking the unusual step of dismissing the complaint without waiting for defendants' answers.

Discussion

Because we are complying with the Committee's request for "immediate and urgent action," we do not have the usual benefit of an evidentiary record or defendants' response to the complaint. We are forced in this instance to evaluate the Committee's complaint on its face.

The Committee relies primarily on our invitation in D.93887 (December 30, 1981) for proposals for using "the economic value of the 'extra space' more efficiently for ratepayers' benefit." The Committee proposes that ratepayers will benefit sufficiently from what the Committee asserts is accurate

information about Proposition 36 to justify including the Committee's materials in the billing envelope of defendant utilities.

Since the invitation of D.93887, however, we have acted on several proposals that have allowed us to refine our views on the appropriate use of the extra space. Our emphasis in our two subsequent decisions has been on using the extra space to improve the quality and degree of consumer participation in our hearings. In granting the Utility Consumers Action Network (UCAN) access to the envelope of SDG&E, we found that an important interest was "the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete consumer understanding possible of energy-related issues" (D.83-04-020, p.17). Similarly, we granted Toward Utility Rate Normalization (TURN) access to PG&E's envelope in part because TURN had "demonstrated in its testimony and in past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population, (was) presently involved in Commission proceedings, (and could not) participate in all the regulatory proceedings of PG&E it might otherwise participate in without significant financial hardship" (D.83-12-047, p. 21).

Better and broader consumer participation not only serves the ideals of democratic government, but it improves the record in our proceedings. From this improved record comes more accurate fact-finding and sounder decisions, to the benefit of all ratepayers.

The Committee has not participated in our proceedings, and its complaint does not suggest that it ever will participate, apart from actions related to its complaint. Its claim to consumer representation is limited to a statement that a "substantial number" of its supporters are ratepayers.

In determining that the extra space could be used to benefit ratepayers, we did not intend to create a public forum for any group that could claim ratepayers as members. Access to the billing envelope has so far been granted only to groups organized specifically to represent ratepayers in our proceedings. While other proposals for use of the extra space may prove to have merit, we do not believe that the Committee's proposal, as set forth in its complaint, sufficiently benefits ratepayers as ratepayers to justify the order the Committee requests.[1]

This matter did not appear on our public agenda as required by the Government Code, however, a sufficient emergency exists, considering that our next regularly scheduled meeting falls after the election, to justify our action today under Public Utilities Code Section 306(b).

Findings of Fact

1. The complaint requests access to the extra space in utility billing envelopes for the purpose of providing information on the effects of Proposition 36 on utility rates.

2. The complaint does not allege that the Committee has participated or intends to participate in our proceedings.

3. The complaint does not allege that the Committee's use of the extra space will improve consumer participation in our proceedings.

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[1] We also note that Public Utilities Code Section 453(d) states, "No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended . . . to promote the passage or defeat of a measure appearing on the ballot at any election . . . ." Although this statute would bar the relief sought in the Committee's complaint, *Consolidated Edison v. Public Service Commission*, 447 U.S. 580 (1980), has raised questions about the constitutionality of the statute. We therefore choose to base our dismissal of the Committee's complaint on other grounds.

Conclusion of Law

The complaint should be dismissed.

Therefore, IT IS ORDERED that the complaint of The Committee of More Than One Million California Taxpayers to Save Prop. 13 is dismissed.

This order is effective today.

Dated October 17, 1984, at San Francisco, California.

I will file a written concurrence.

/s/ VICTOR CALVO
Commissioner

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

I will file a written concurrence.

/s/ WILLIAM T. BAGLEY
Commissioner

COMMISSIONER VICTOR CALVO, concurring.

The reasons stated by the majority for dismissal of the complaint may be well and good, however, my concurrence with the results of this order follows a different reasoning. As I pointed out in my dissent to the order cited by the majority, I am not convinced that anyone, whether a ratepayer group or, as here, a political advocate, is entitled to invade a public utility's billing envelope to convey their messages. (See dissenting opinion of Commissioner Calvo, *Toward Utility Rate Normalization v. Pacific Gas and Electric Company*, Decision 84-05-039, Case 83-05-13, ____ CPUC ____ (1984).)

I believe other media and forums exist that are better suited to carry those messages and I believe that they should be used in favor of a utility's billing envelope. As a result, I do not examine the issue of this complainant's worthiness or intentions. I would simply dismiss the complaint because the relief requested is still at issue before us and is something I am not inclined to grant.

/s/ VICTOR CALVO
Victor Calvo
Commissioner

October 17, 1984
San Francisco, California

William T. Bagley, Commissioner, Concurring:

This concurrence is written in order to express my continuing disagreement with the Commission majority in *T.U.R.N. v. PG&E*, Decision 83-12-047.

In that decision, the majority (at page 23) states "It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views". As unconstitutionally presumptuous as that majority statement may be, if in fact it is valid for T.U.R.N. then it should be valid for Howard Jarvis and the petitioner herein. And if in fact T.U.R.N. has some type of "equitable property right" in the envelope space, derived through ratepayers, then perhaps so does the Committe of More Than One Million California Taxpayers to Save Prop. 13 (Committee). These people who signed the Proposition 36 petitions are California residents, voters and ratepayers.

And further, specific intervenors in P.U.C. proceedings now have the benefit of S.B. 4, (Montoya), signed by the Governor and chaptered as law this year. S.B. 4 authorizes the award of intervenor fees by the P.U.C. It thus becomes less "necessary" for intervenor organizations such as T.U.R.N. to exercise their equitable property right to use the billing envelope for fund raising purposes. That being the case, there is more relative reason to assign some of that space to organizations such as that of petitioners. Courts of Equity might so decree.

It is recognized, as stated in the *T.U.R.N. v. PG&E* dissent, that such extensions of the majority opinion will "result in a legal and administrative morass". Nonetheless, with that T.U.R.N. majority opinion before us, we cannot simply reject other applicants as is done here.

I do concur in the rejection, not on the basis stated by the majority, but because I continue to believe that any and all such assignment of envelope space by this Commission to other entities is a deprivation of the constitutional rights of the subject utility companies. The real solution, of course, is for this Commission to rescind Decision 83-12-047.

/s/ WILLIAM T. BAGLEY
William T. Bagley

October 17, 1984

APPENDIX M

Article 18.5 Rules for Implementation of PURPA Section 122(a)(2)

76.0. (Rule 76.01) Purpose.

The purpose of this article is to establish procedures for awarding reasonable fees and costs to consumers of electric utilities pursuant to PURPA Section 122(a)(2).

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

HISTORY:

1. New Article 18.5 (Sections 76.01-76.10) filed 8-13-80; designated effective 7-27-80 by Public Utilities Commission Decision No. 91909, see Section 11445, Government Code (Register 80, No. 33).

76.02. (Rule 76.02) Definitions.

When used in this article:

(a) "PURPA" means Public Utility Regulatory Policies Act of 1978.

(b) "Compensation" means reasonable attorneys' fees, expert witness fees, and other reasonable costs.

(c) "PURPA position" means a factual contention, legal contention, or specific recommendation promoting one of the following PURPA purposes and relating to one or more of the following PURPA subtitle B standards:

(1) PURPA purposes:

(A) Conservation of energy supplied by electric utilities

(B) Optimization of the efficiency of use of facilities

(C) Equitable rates to electric consumers

(2) PURPA Ratemaking Standards:

(A) Cost of Service—S 111(d)(1)

(B) Declining Block Rates—S 111(d)(2)

(C) Time-of-Day Rates—S 111(d)(3)

(D) Seasonal Rates—S 111(d)(4)

(E) Interruptible Rates—S 111(d)(5)

(F) Load Management Techniques—S 111(d)(6)

(3) Other PURPA Standards:

(A) Master Metering—S 113(b)(1)

(B) Automatic Adjustment Clauses—S 113(b)(2)

(C) Information to Consumers—S 113(b)(3)

(D) Procedures for Termination of Electric Service—S 113(d)(4)

(E) Advertising—S 113(d)(5)

(d) "Consumer" means any retail electric consumer of an electric utility, any authorized representative of such a consumer, or any representative of a group or organization authorized, pursuant to articles of incorporation or by-laws, to represent the interests of consumers.

(e) "Expert witness fees" means recorded or billed costs incurred by a consumer for an expert witness with respect to a PURPA issue.

(f) "Other reasoanble costs" means reasonable out-of-pocket expenses incurred by a consumer with respect to a PURPA issue not exceeding twenty-five percent (25%) of the total of reasonable attorneys' fees and expert witness fees awarded.

(g) "Party" shall mean any interested party, respondent, utility, or Commission staff of record in a proceeding.

(h) "Proceeding" shall mean any application, case, investigation, or other procedure of the Commission related to or involving electric rates or rate design which is initiated after the date the rules herein become effective and in which a PURPA position is considered.

(i) "Reasonable fees" shall be computed at prevailing market rates for persons of comparable training and experience who are offering similar services. In no event shall such fees exceed those paid by the Commission or the utility, whichever is greater, for persons of comparable training and experience who are offering similar services.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617

HISTORY:

1. Amendment of subsection (h) filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11445, Government Code (Register 81, No. 7).

76.03. (Rule 76.03) Consumer's Request.

Within thirty days of the first prehearing conference in a proceeding the consumer shall file with the Commission's Docket Office and serve on the parties known or contemplated at that time a Request for Finding of Eligibility for Compensation, in compliance with rules 2, 3, 4, 6, and 7, and with an attached certificate of service by mail on appearances. In cases where no pre-hearing conference is scheduled or where the ALJ anticipates the proceeding will take less than 30 days, the ALJ shall determine the procedure to be used for filing petitions for reimbursement. In all cases, the petition for reimbursement must set forth the following:

(a) A showing that, but for the ability to receive compensation under these rules, participation or intervention in the proceeding may be a significant financial hardship for such consumer. Such showing shall include a specific budget for the representation and a summary description of the finances of the consumer which distinguishes between grant funds committed to specific projects and discretionary funds.

(b) A statement of the PURPA issues which the consumer intends to raise in the proceeding, together with a statement of the consumer's position on each such issue.

(c) A showing addressing representation of persons with the same or similar interests by a common legal representative.

(d) An estimate of the compensation to which the consumer believes it may be entitled to at any stage of the proceeding and the basis for such estimate, including a budget.

(e) For a consumer who claims to represent the interests of other consumers, a showing which includes the articles of incorporation, by-laws, membership structure, composition of Board of Directors, and newsletter circulation, if any, along with a summary description of the previous work of the consumer.

NOTE: Authority cited: Section 1701, Public Utilites Code. Reference: PL 95-617.

HISTORY:

1. Amendment filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11445, Government Code (Register 81, No. 7).

76.04. (Rule 76.04) Showing of Other Parties.

Except as provided by the ALJ in accordance with Rule 76.03, the Commission staff shall file with the Commission's Docket Office a statement within ten days after the consumer's filing or 30 days after the commencement of the proceeding, whichever occurs later, declaring whether it intends to take a position different from the consumer. Any other party may file comments on a consumer's request within ten days after the request is filed. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7, and be accompanied by a certificate of service on appearances by mail.

NOTE: Authority cited: Section 1701, Public Utilites Code. Reference: PL 95-617.

HISTORY:

1. Amendment filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11445, Government Code (Register 81, No.7).

76.05. (Rule 76.05) Commission Ruling.

At the first regularly scheduled conference after the statement of the Commission staff has been filed, the Commission shall issue a ruling as to the following items:

(a) Whether or not the consumer has met its burden of showing "significant financial hardship" pursuant to Rule 76.05(c).

(b) A designation, if appropriate, of the "common legal representative" to represent persons with the same or similar interests as provided for in PURPA Section 122(a)(2), which designation shall be binding for the remainder of the proceeding.

(c) Whether or not "Significant financial hardship" has been shown by consumers:

(1) who have, or represent, an interest

(A) which would not otherwise be adequately represented in the proceeding, and

(B) representation of which is necessary for a fair determination in the proceeding, and

(C) who are, or represent an interest which is, unable to effectively participate or intervene in the proceeding because such persons cannot afford to pay reasonable attorneys' fees, expert witness fees, and other reasonable costs of preparing for, and participating or intervening in, such proceeding (including fees and costs of obtaining judicial review of such proceeding).

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

(2) who, in the case of a group or organization, demonstrate that the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding. Such showing shall constitute a prima facie demonstration of need as required by Rule 76.05(c)1(C).

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

76.06 (Rule 76.06) Compensation Filings of Consumer.

Following issuance of a Commission order or decision during a proceeding pursuant to Rule 76.05 a consumer may file a request for compensation with the Docket Office. The filing shall comply with Rules 2, 3, 4, 6, and 7, and shall have a certificate of service by mail on appearances attached. Such request shall include a detailed description of hourly services and expenditures or invoices for which compensation is sought. To the extent possible, this breakdown of services and expenses should be related to specific PURPA issues. The request shall also describe how the consumer has substantilly contributed to the adoption, in whole or in part, in a Commission order or decision, of a PURPA position advocated by the consumer related to a PURPA standard. "Substantial contribution" shall be that contribution which, in the judgment of the Commission, substantially assists the Commission to promote a PURPA purpose in a manner relating to a PURPA standard by the adoption, at least in part, of the consumer's position. A showing of substantial contribution shall include, but not be limited to, a demonstration that the Commission's order or decision has adopted factual contention(s), legal contention(s), and/or specific recommendation(s) presented by the consumer.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

HISTORY:

1. Amendment filed 2-11-81; designated effective 1-6-81 by Decision No. 91909. see Section 11445, Government Code (Register 81, No. 7).

76.07. (Rule 76.07) Staff Audit of Consumer's Records.

At the direction of the Commission, the Commission staff may audit the records and books of the consumer to the extent necessary to verify that compensation sought is reasonable. Within twenty days after completion of the audit, if any, an audit report shall be filed with the Commission.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

76.08. (Rule 76.08) Commission Decision.

Within 30 days of the filing of a request for compensation or within 20 days after the filing of the staff audit report, if any, the Commission shall issue a decision describing the contribution found to have been made and the compensation awarded.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

76.09. (Rule 76.09) Payment of Compensation.

The electric utility shall pay any award of compensation to the consumer within 30 days after the Commission's decision is issued, unless a timely application for rehearing with respect to the issue of compensation is filed, in which case no payment will be required until an order denying rehearing or an order after rehearing is issued.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

76.10. (Rule 76.10) Consumer Request After Hearings Commence.

(a) A consumer who has not requested a finding of eligibility for compensation pursuant to Rule 76.03 may make such a request after hearings have begun. Such request shall not be granted unless all the requirements of Rule 76.03 are met and the consumer can demonstrate that absent participation by the consumer, an important issue relating to a PURPA standard has not or will be adequately considered in the proceeding. In no event may such a request be filed after Day 110 in an electric rate case subject to the Regulatory Lag Plan as adopted by Resolution No. M-4706 (adopted June 5, 1979).

(b) A request pursuant to this Rule shall be filed within five days of the date of the appearance by the consumer in the proceeding. Any comment by the staff or any party, in the nature of that described in Rule 76.04, shall be filed within five working days of the consumer's request. A ruling in the nature of that described in Rule 76.05 shall at the first regularly scheduled conference after the filing of the consumer's request. All filings pursuant to this Rule shall comply with Rules 2, 3, 4,

6, and 7 and shall have a certificate of service on appearances by mail attached.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

76.11. Provisions for Reimbursement.

For cases which were pending on the date these rules became effective, where the rules concerning time for filing requests for eligibility and reimbursement, the time for filing responses thereto, and time for a Commission decision thereon cannot be met, parties may file requests for reimbursement in compliance with all of the remaining rules. Such requests must be filed within 60 days of the date the order adopting this rule is made effective. The Commission will consider all such requests on an individual basis. The exception established by this rule is not applicable to cases in which a decision on the relevant PURPA issue or issues was issued prior to July 28, 1980.

NOTE: Authority and reference cited: Section 1701, Public Utilities Code; Stats. 1947, Ch. 1425.

HISTORY:

1. New section filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11445, Government Code (Register 81, No. 7).

Article 18.6 Procedure for Awarding Compensation to Public Participants in Commission Proceedings

76.21. (Rule 76.21) Purpose.

The purpose of this article is to establish procedures for awarding reasonable fees and costs to participants in proceedings before this Commission.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

HISTORY:

1. New Article 18.6 (Sections 76.21-76.32) filed 5-5-83; designated effective 5-6-83 pursuant to Government Code Section 11351 (Register 83, No. 19).

76.22. (Rule 76.22) Definitions.

(a) "Compensation" means reasonable advocate fees, expert witness fees, and other reasonable costs.

(b) "Issue" means an issue relating to the rates, charges, service, facilities, practices, or operations of one or more of the public utilities of this State that are regulated by this Commission.

(c) "Position" means a factual contention, legal contention, or specific recommendation by a party relating to an issue to be addressed in a Commission proceeding.

(d) "Participant" means any individual, group of individuals, organization, association, partnership, or corporation taking part or intending to take part in a Commission proceeding. For the purpose of these rules the term participant does not include governmental entities.

(e) "Expert Witness Fees" means recorded costs incurred in connection with a commission proceeding by a participant with respect to an issue and confirmed by the Commission to be reasonable.

(f) "Other Reasonable Costs" shall include out-of-pocket expenses incurred by the participant with respect to an issue but shall not normally exceed 25% of the reasonable advocate fees and expert witness fees awarded. The burden of establishing that any costs incurred were reasonable is on the participant.

(g) "Party" means any interested party, respondent, utility, complainant, protestant, or Commission staff of record in a proceeding.

(h) "Proceeding" means any application, case, investigation, rulemaking, or other formal matter before the Commission.

(i) "Reasonable Fees" means fees recorded by the participant in support of its participation in a proceeding. Reasonableness shall be computed at the prevailing market rates for persons of comparable training and experience who are offering similar services. In no event shall such fees (as

distinguished from employee salaries) exceed those paid by the Commission or the utility, whichever is greater, for persons of comparable training and experience who are offering similar services.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

7623. (Rule 76.23) Participant's Request.

As soon after the commencement of a proceeding as is reasonably possible, but in any event before the beginning of evidentiary hearings the proceeding, or after evidentiary hearings are completed, the participant shall file with the Commission's Docket Office and serve on all the parties to the proceeding a Notice of Intent to Claim Compensation, in compliance with Rules 2, 3, 4, 6, and 7 and with an attached certificate of service by mail on appearances. In all cases, the Notice of Intent must set forth the following:

(a) A showing that, but for the ability to receive compensation under these rules, participation or intervention in the proceeding may be a significant financial hardship for such participant. Such showing should address the factors set forth in Rule 76.25(a) (1) or (2). A summary description of the finances for the participant should distinguish between grant funds committed to specific projects and discretionary funds. If the Commission has determined that the participant has met its burden of showing financial hardship previously in the same calendar year, participant shall make reference to that decision by number to satisfy this requirement.

(b) In every case, a specific budget for the participation shall be filed showing the total compensation which the participant believes it may be entitled to the basis for such estimate, and the extent of financial commitment to the participation. If at any time during the proceeding changes in the issues, scope, or positions of parties cause a fluctuation of more than 20%, plus or minus, in the estimated budget, the participant shall file an amended budget and serve it on all parties.

(c) A statement of the nature and extent of planned participation in the proceeding as far as it is possible to set it out when the Notice of Intent to Claim Compensation is filed.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

76.24. (Rule 76.24) Showing of Other Parties.

The Commission staff and any other party to the proceeding may file a statement within 15 days after the participant's filing commenting on any portion of that filing and making appropriate recommendations to the Commission. The filings under this Rule shall comply with Rules 2, 3, 4, 6 and 7 and be accompanied by a certificate of service by mail on appearances.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

76.25. (Rule 76.25) Commission Ruling.

Within 45 days after the comments of staff and other parties are due, the Commission shall issue a decision ruling on:

(a) Whether the participant has met its burden of showing significant financial hardship in this proceeding or in a prior proceeding in the same calendar year. This can be shown by participants:

(1) Who have, or represent an interest:

(A) Which would not otherwise be adequately represented in the proceeding, and

(B) Whose representation is necessary for a fair determination in the proceeding, and

(C) Who have, or represent an interest but are unable to participate effectively in the proceeding because such person(s) cannot afford to pay reasonable advocate fees, expert witness fees, and/or other reasonable costs of preparing for, and participating in such proceeding (including fees and costs of obtaining judicial review of such proceeding), or

(2) Who, in the case of a group or organization, demonstrate that the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding. Such showing shall constitute a prima facie demonstration of need as required by Rule 76.25(a)(1)(C).

The Commission may also point out similar positions, areas of potential duplication in showing, unrealistic expectations for compensation, and any other matter of which it is aware which would affect the participant's ultimate claim for compensation. Failure of the Commission to point out similar positions or potential duplication or any other potential impact on the ultimate claim for compensation shall not imply approval of any claim for compensation. A finding of significant financial hardship in no way ensures compensation.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

76.26. (Rule 76.26) Compensation Filings of Participant.

Within 30 days following the issuance of a Commission order or decision for which a ruling under Rule 76.25 has been made, a participant may file a request for compensation with the Docket Office. The filing shall comply with Rules 2, 3, 4, 6, and 7 and shall have attached a certificate of service by mail on appearances. Such a request shall include a detailed description of hourly services and expenditures or invoices for which compensation is sought. This breakdown of services and expenses shall be related to specific issues. The request shall also describe how the participant has substantially contributed to the adoption, in whole or in part, in a Commission order or decision, of an issue. In order to be eligible for compensation, a participant must raise a different issue, present or elicit new or different evidence, raise new or different arguments in support of a position or take a different position from that of the staff and any other party.

In proceedings where some or all of the relief sought by a participant is obtained without a Commission order or decision

the participant may be entitled to compensation by clearly establishing a casual relationship between its participation and such relief.

"Substantial contribution" shall be that contribution which, in the judgment of the Commission, greatly assists the Commission to promote a public purpose in a matter relating to an issue by the adoption, at least in part, of the participant's position. A showing of substantial contribution shall include, but need not be limited to, a demonstration that the Commission's order or decision has adopted factual contention(s), legal contention(s), and/or specific recommendation(s) presented by the participant. A showing should also include an analysis of other factors which may affect the appropriate amount of the award. These factors include, but are not necessarily limited, to the following:

1. Time and labor expended in the participation.
2. The novelty and difficulty of the issues presented.
3. The skill required to participate effectively.
4. The preclusion of other employment due to participation in this matter.
5. The customary fee.
6. Whether the fee is fixed or contingent.
7. Time constraints imposed by the proceeding.
8. The amount involved and the results obtained.
9. The experience, reputation, and ability of the participants.
10. Awards in similar cases.

76.27. (Rule 76.27) Staff Audit of Participant's Records.

At the direction of the assigned ALJ, the Commission staff may audit the record and books of the participant to the extent necessary to verify the compensation sought is reasonable. Within 20 days after completion of the audit, if any, an audit report shall be filed with the Commission and served on all parties.

In addition to, or in lieu of an audit, the ALJ may request additional information from the participant in order to clarify or substantiate the amount of the compensation.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

76.28. (Rule 76.28) Protests.

Within 30 days of the filing of a request for compensation or within 20 days after the filing of the staff audit, if any, whichever is later, the Commission staff or any other party may file a protest with the Commission's Docket Office. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and be accompanied by a certificate of service by mail on parties.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

76.29. (Rule 76.29) Commission Decision.

As soon after the filing of a request for compensation or as soon after the filing of an audit report or protests, if any, as is reasonably possible, the Commission shall issue a decision describing the contribution found to have been made by the participant and the compensation to be awarded. The decision shall specify the basis for finding a substantial contribution and for setting the attendant award of compensation.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

76.30. (Rule 76.30) Payment of Compensation.

(a) The utility shall pay any award of compensation to the participant within 45 days after the Commission's decision becomes effective.

(b) If additional costs are incurred as a result of an application for rehearing on the issue of compensation, the participant may file an amended claim setting forth these costs and substantiating them in the same manner as the original claim.

(c) The amount of this payment shall be assigned to a deferred expense account for recovery in the utility's next general rate case, attrition allowance, or other proceeding changing base rates. Such recovery shall be the amount authorized by the Commission for payment and shall be had without further litigation of the reasonableness of the amount. Such recovery shall not include interest.

(d) In case of an award in a proceeding involving more than one utility, payment will be made by each utility in a proportion to be determined by the Commission.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

76.31. (Rule 76.31) Participant Request After Hearing.

(a) A participant who has not requested a finding of eligibility for compensation under Rule 76.23 may make such a request after evidentiary hearings have begun. Such request shall not be granted unless good cause for the late request is shown and unless the requirements of Rule 76.23 are met and unless the participant can demonstrate that, absent participation by the participant, an important issue has not or will not be adequately considered in the proceeding.

(b) A request under the Rule shall be filed within five days of the date of the appearance by the participant in the proceeding. Comments by the staff or any party, in the nature of that described in Rule 76.25, shall be made within 20 days after the filing of the participant's request. All filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and shall have attached a certificate of service by mail on parties.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

76.32. (Rule 76.32) Provisions for Reimbursement.

These rules will apply to issues raised subsequent to the effective date of the order promulgating these rules in any pending cases, applications, investigations, and rulemakings, and to all cases, applications, and investigations filed on or after

the effective date of the order promulgating these rules, without regard to the formal status of the matter on the effective date of these rules. A proceeding will be deemed initiated on the date an application or complaint is filed or an order instituting investigation is issued. Times for filing various requests and responses set forth in these rules shall be adhered to except that any Commission decision on the requests will be held in abeyance until these rules become effective.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

Article 19. Decisions and Proposed Reports

77. (Rule 77) Issuance of Decisions.

A proceeding shall stand submitted for decision by the Commission after the taking of evidence, and the filing of such briefs or the presentation of such oral argument as may have been prescribed by the Commission or the presiding officer.

78. (Rule 78) Petition for Proposed Report.

A party to a proceeding may file a petition requesting that a proposed report be issued by the presiding officer. Such petition shall be filed and called to the attention of the presiding officer before the conclusion of the hearing. The original and twelve copies of the petition shall be filed with the Commission, and the original shall show that copies have been served upon all parties to the proceeding. The petition shall set forth the reasons why it is believed that issuance of such a proposed report will promote the administration of justice and will not cause unreasonable delay in the final determination of the proceeding. Objections may be served and filed by other parties within five days after service of the petition.

79. (Rule 79) Proposed Reports.

Upon direction by the Commission, the presiding officer shall prepare and file his proposed report. The Secretary's office shall cause copies thereof to be served upon all parties to

the proceeding. Such proposed report shall contain recommended findings, conclusions, and order.

80. (Rule 80) Exceptions.

A party may serve and file exceptions to a proposed report within twenty days after service thereof. Exceptions shall be specific, and stated and numbered separately. Exceptions to factual findings shall specify the portions of the record relied upon; proposed substitute findings; and proposed additional findings, with supporting reasons. Exceptions to conclusions shall cite statutory provisions or principal authorities relied upon; proposed substitute conclusions; and proposed additional conclusions.

81. (Rule 81) Replies to Exceptions.

Replies may be served and filed within fifteen days after service of exceptions.

81.5. (Rule 81.5) Commission Meetings.

Commission meetings shall be held on a regularly scheduled basis for the purpose of considering and signing decisions and orders and taking such other action as the Commission deems appropriate. The time and place of these meetings will appear daily in the Commission calendar at least three weeks in advance. The meetings are open to the public. An agenda of the meeting is available from the Secretary on request. No unscheduled meeting to take action shall be held, and no matter not on the agenda of a meeting shall be decided, unless there is a determination by the Commission of an unforeseen emergency condition.

Unforeseen emergency condition is defined as a matter brought to the attention of the Commission which requires decision or action by the Commission more promptly than would be permitted if advance publication were made on the regular meeting agenda. Examples of such matters are requests for relief based on extraordinary conditions in which time is of the essence; deadlines imposed on the Commission by legislative bodies, the courts, other administrative bodies or tribunals, the office of the Governor, or a legislator; or some unusual

matter which cannot be disposed of by normal procedure if the duties of the Commission are to be fulfilled.

NOTE: Authority cited: Section 1701, Public Utilities Code.

HISTORY:

1. New rule filed 2-21-75; effective thirtieth day thereafter (Register 75, No. 8). Note: Filing states Resolution No. L-163 dated February 4, 1975, adding Rule 81.5 is effective February 4, 1975.

2. New rule refiled 2-24-75; effective thirtieth day thereafter (Register 75, No. 8). Note: Filing states Resolution No. L-163 dated February 11, 1975, adding Rule 81.5 is effective February 11, 1975.

82. (Rule 82) Service of Orders.

Decisions and orders shall be served by the Secretary's office by mailing copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a copy thereof. When a party to an application proceeding has appeared by a representative, service upon such representative shall be deemed to be service upon the party.

83. (Rule 83) Effective Date.

Decisions and orders in complaint or investigation proceedings shall become effective twenty days after service thereof, unless otherwise provided therein. Decisions and orders in other proceedings shall become effective twenty days after issuance thereof, unless otherwise provided therein.

Article 20. Reopening Proceedings

84. (Rule 84) Petition to Set Aside Submission.

After conclusion of hearings, but before issuance of a decision, a party to the proceeding may serve on all other parties, and file with the Commission, a petition to set aside submission and reopen the proceeding for the taking of additional evidence. Such petition shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced.

EDITOR'S NOTE

PAGES A-183 THRU END WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

DECEMBER 1984 APPENDIX N

PG&E Progress

PG&E Helps Protect Bald Eagles—Page 4
How to Weatherstrip your Home—Page 7

Holiday Greetings . . .



. . . from the men and women of PG&E, who work to bring you gas and electric service, in all weather and all seasons. But it is during this season in particular that we welcome the chance to express our thanks for the privilege of serving you, our friends and neighbors.

CPUC Increases Baseline Quantities

Baseline winter and summer quantities for many PG&E customers have been increased by the California Public Utilities Commission (CPUC).

The new higher quantities went into effect November 15. They will mean savings on energy bills for many customers.

Baseline, like the Lifeline system it replaced in May, provides basic amounts of energy at minimum rates.

Winter gas Baseline quantities were increased for all PG&E customers. Many winter all-electric quantities were raised as well. (If you have an electric water heater you have been reclassified as an all-electric customer.)

The proposal to raise Baseline quantities was submitted jointly by PG&E and the

Continued on page 8

Automatic Payment, Balanced Payment Make Bill Paying Easier for You

You can join the thousands of PG&E customers who have their monthly energy bill payment deducted automatically from their bank, savings and loan or credit union account.

The Automatic Payment Service (APS) lets you authorize the transfer of funds from your checking or savings account to pay your PG&E bill.

You still receive a monthly statement so you can keep track of your energy use, and you have up to ten days to review the statement before the automatic payment is made.

Best of all, there is no danger that your gas and electric service would be interrupted if you should take a long business or vacation trip and miss a bill payment.

Your monthly statement from your financial institution will show the amount that has been deducted to pay your energy bill.

Another service available from some large banks and savings and loans is electronic funds transfer, using just a telephone or your home computer and a modem connected to your telephone.

Through your computer you instruct your bank to transfer funds to your PG&E account from your checking or savings account.

Although you don't get a cancelled check when you pay electronically, your payment will be noted on your PG&E bill and your financial statement each month.

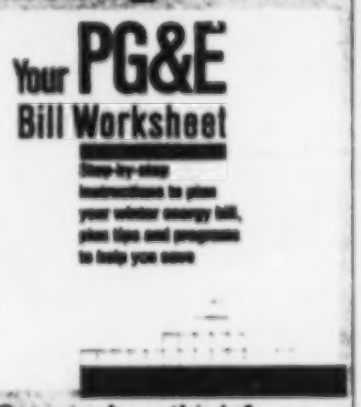
And, if seasonal weather changes or increased holiday activities cause your utility bill to jump, there's a way to even out those bills and stop the surprises. It's called the Balanced Payment Plan or BPP.

BPP evens out your annual PG&E bills so that you pay a set amount each month. You will know in advance how much you'll be paying and you can join or drop anytime.

Plan Your Energy Bill

Plan your winter energy bill this winter. A new publication, "Your PG&E Bill Worksheet" can help.

You'll find easy step-by-step instructions to calculate your energy bill and determine which of your appliances uses the most energy.



Once you have this information, you can find ways to cut back and save on your energy bill this winter.

Just call or visit your local office for a free copy. When you complete the worksheet and return the reply card, PG&E will send you a special Energy 1985 calendar that's filled with energy tips to help you save year round.

When you sign up for BPP, the company analyzes your gas and electric use during the past year to calculate what you will be paying this year.

If you've had service for less than a year, you can still join. PG&E uses a formula based on energy use of customers on the same rate schedule.

Once your average yearly bill has been determined, it is divided into 12 even payments. That's the balanced amount you'll pay each month.

Your meter is read regularly and each bill tells you how much gas and electricity you used the previous month. The bill also tells you how much you would owe for the month if you weren't on the plan.

Your account is reviewed every four months. Of course, the amount of energy you use this year won't be exactly the same as last year because of variations in weather patterns, the addition of new appliances and your own conservation efforts. All this is considered when your account is reanalyzed.

At the end of a year, you'll receive an adjusted bill that will reflect any overpayment or underpayment on your BPP account.

If PG&E owes you more than $10, you will receive a check. If it's less we will apply it to your account.

And if you have underpaid, that amount will be indicated on your adjustment bill.

Applications for these convenient services are available at all PG&E offices or by calling your local service representative at the telephone number listed on your bill.

Letters From Customers

Earlier in the year there was a short item in Progress on plastic window coverings. Many customers wrote for more information.

Could you possibly give me some more information on those plastic window coverings you wrote about earlier this year. I went to my local hardware store and they didn't know much about them.

—San Francisco

We went to our technical experts for more information on these window coverings. Here's what they had to say.

You may want to visit a large hardware or home improvement store and ask if they have plastic storm window kits or window insulator kits. These products are intended to do more or less the same thing as storm windows, but at a lower price.

Because of the ease of handling, most of these new products are plastic. They are usually designed to be installed on the inside of the home, so they are sometimes referred to as plastic interior storm windows.

Unlike plastic films that are affixed directly to the existing glass, these plastic coverings leave an air space between the glass and the plastic, which helps reduce heat loss.

The least expensive brands have thinner plastic, usually secured directly to the frame, and are more or less permanently installed—so you wouldn't be able to open the window if you use this type. At least one brand of this type shrinks taut when heated with a hair dryer, to give an undistorted view.

The very thin plastic, however, offers practically no resistance to heat radiation and so allows more heat loss from your home than do some of the thicker plastics or glass. The thin plastic could help reduce drafts or infiltration, but it won't be as good as a glass storm window. Also, sharp objects could puncture the thin plastic.

Most of the thicker plastic storm windows come with some sort of plastic frame, attached to the window frame by various means such as magnets which allow easier removal and reinstallation. So you could remove this type to open the window. Because of the heavier plastic and the frames, though, they are more expensive than the others, but are probably more durable. Also, their higher resistance to heat radiation makes them more energy-efficient. On the other hand, they are not as clear as glass, so they may detract from your view.

Before you invest in plastic window covers you should request a free PG&E home energy audit. The auditor can suggest ways to save energy based on your home and lifestyle. Call your local PG&E office to make an appointment.

Send your questions and concerns to:
Kathy Hyams
Room 1770, 77 Beale St.
San Francisco, CA 94106



A PICTURE FROM THE PAST: The equipment for laying gas pipelines wasn't quite as sophisticated in 1929 as it is now. But the end result was the same then as it is today—reliable and safe gas service. The two men shown here were working in the Kettleman Hills area near Coalinga on a cold November day.

PG&E Works to Safeguard Bald Eagle Nesting Area

Bald eagles in the Pit River area of Northern California have a friend in PG&E. The company, cooperating with state and federal agencies, is working to help them prosper.

The Pit River area boasts the densest nesting population of these great birds in California.

Eight pairs of bald eagles, almost 15 percent of the breeding population in California, make their home in the area where PG&E has several hydroelectric powerhouses.

PG&E is working in conjunction with state and federal agencies in a two-year study of the bald eagles in the Pit River area.

Study results will help PG&E and resource agencies manage and improve wildlife habitat and safeguard the eagles.

The bald eagle, America's national bird, is an endangered species. There are hopeful signs, however, that their number is increasing in California.

"We're finding out what they eat, how they catch their food and the effects of the environment on the birds," says Mark Jenkins, a PG&E wildlife biologist.

Parts of the study have to be done in the eagles' own nest, which generally sits high up in a tree.

A brave biologist suits up in protective clothing, ties a rope ladder to the tree and climbs one hundred dizzying feet up to the nest.

He gently lifts a young eagle from the nest and lowers it in a basket to a ground team below.

The researchers carefully remove the young bird from the basket and cover its head with a hood to keep it from panicking.

The nestling is then weighed, measured and fitted with a tiny radio transmitter so biologists can keep track of its movements. The transmitter is designed to fall off after a month.

Then the young bird is carefully placed back in the nest by the biologist.

Biologists also collect bones and other material left of the forest creatures that became earlier eagle dinners.

"This collection helps us learn more about the birds' diet," says Jenkins.

Bald eagles primarily eat fish but they also eat waterfowl in the fall and winter when they pass through the state during migration.

Since fish are the mainstay of the bald eagles' diet, another part of the study traces the movement of fish through the Pit River system.

Fish are trapped, radio-tagged and later tracked so that PG&E can better understand the relationship between eagle and fish.

One winter day the researchers watched in awe as a group of 11 eagles eyed the fish in the water. Periodically the birds would snatch fish from the water's surface and devour them.

"In 1983, the eagles raised in the Pit River area raised ten young," says Jenkins. "This is more than in previous years."

Other bald eagles from Alaska, British Columbia and Washington stop in this area during their migration.

Results of the study, which ends next year, will go into a long-range management plan to help protect fish and bald eagle populations for many years to come.

In the Pit River area, which boasts the densest nesting population of bald eagles in California, biologists place tiny radio transmitters on young eagles to collect data on this endangered species.

Make-Ahead Festive Holiday Brunch

How about a festive brunch during the holiday season for family or special friends? The casserole and cake can be prepared the day before and baked just before serving.

To make preparation day easier, the chicken can be cooked ahead of time or you can used canned chicken.

Serve with fresh fruit such as pineapple, pears, apples, grapes, oranges, grapefruit or kiwi.

Holiday Cake/Bread

- 4½ to 5 cups unsifted flour*
- 2 packages active dry yeast
- ½ cup sugar
- 1 teaspoon salt
- ½ cup butter or margarine (room temperature)
- 1½ cups very hot tap water
- 2 eggs
- ¼ cup diced candied red cherries
- ¼ cup diced candied green pineapple
- ¼ cup seedless raisins
- 1 cup coarsely chopped walnuts

In large mixer bowl, combine 2 cups flour, yeast, sugar and salt, mixing well. Add butter; with mixer at low speed, cut butter into flour mixture.

*Note: use "bread" flour, preferably; otherwise, use all-purpose.

Add hot water, all at once, and beat on medium speed for 2 minutes, scraping bowl occasionally. Add eggs and 1 cup flour, mixing well. Remove beaters. With wooden spoon, stir in cherries, pineapple, raisins and nuts. Add about 1½ cups more flour or enough to make a stiff dough that you can knead. Spoon into a well-greased 10-inch bundt pan (or angel cake pan). Cover tightly with plastic wrap which has been greased generously. (Dough will rise against plastic.) Cover with foil and store overnight in refrigerator. To bake: remove foil and plastic wrap, then cover loosely with foil. Let stand at room tem-



perature for 1 hour. Remove foil and bake along with Chicken 'en Casserole in 350° oven (cold start) for 50 to 60 minutes, or until deep brown on top. Turn out on rack to cool. While warm, sprinkle with powdered sugar, or drizzle frosting over all and decorate as desired with whole pecans or almonds and green and red candied fruit. Serve warm.

Powdered Sugar Frosting: Combine 1 cup sifted powdered sugar, ½ teaspoon vanilla and 1 to 1½ tablespoons light cream, mixing well. Drizzle over cake/bread.

Chicken Casserole

- 1 3-pound chicken (about), cut up
- Onion, carrot, celery, parsley
- Salt and pepper
- Water
- 1¼ cups raw long grain rice, or half wild rice and long grain
- 6 sliced low-fat bacon
- 2 tablespoons sliced green onion
- 1 10½ ounce can cream of chicken soup
- ¼ cup milk
- 2 tablespoons chopped fresh parsley
- 1 tablespoon cooking sherry, optional
- 1 tablespoon lemon juice
- 2 tablespoons grated Parmesan cheese

Place chicken in large saucepot. Add 1 onion, 1 stalk celery, 1 carrot, springs of parsley, salt and pepper to taste. Cover chicken with water. Bring to boil, then simmer about 1 hour or until fork tender. Let chicken cool in liquid. Remove meat from bones. Reserve broth. Measure 2½ cups broth into saucepan; bring to boil. Add rice and simmer until tender, about 25 minutes. Turn cooked rice into buttered 1½-quart baking dish. Layer chicken pieces over rice. Meanwhile, cook bacon until crisp; drain and chop. Reserve 1 tablespoon bacon fat in skillet; add onion and saute until limp. Combine soup, onion, milk, parsley, sherry and lemon juice, mixing well. Pour over chicken and rice. Layer Parmesan cheese and bacon over top. Cover tightly and store in refrigerator. To bake: cover loosely with foil and bake along with Holiday Cake/Bread in 350° oven (cold start) for 50 to 60 minutes, or until heated through. Makes 6 to 8 servings.

How to Weatherstrip Your Home this Winter

Don't underestimate those small cracks around doors and windows. Many small air leaks can add up to make your house drafty and uncomfortable and add to your energy bill.

Door Weatherstripping
There are two basic kinds of weatherstripping for doors. One is used around the door frame, the other is used at the base of the door.

Door frame weatherstripping fits around the sides and top of your doors. It is made from several different materials and comes in many different sizes and shapes. It can be installed outside the door on the door frame or between the door and the frame.

Outside-the-frame weatherstripping comes in vinyl or metal and wood in combination with other materials. It is generally referred to as gasket weatherstripping.

Inside-the-frame weatherstripping can be spring metal stripping, v-shaped cushion metal stripping or interlocking metal strips which require mounting on both the door and the door frame.

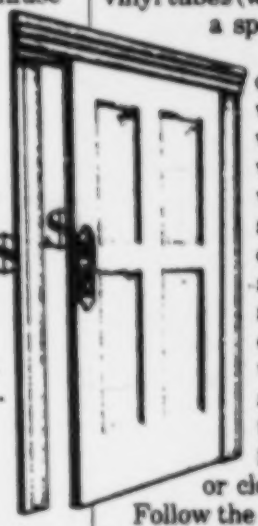
Doorsill weatherstripping, which is fastened to the bottom of the door or the threshold, comes in several forms.

You can choose spring metal, interlocking metal strips, metal and plastic door shoes, flap seals or automatic door bottoms which are installed on the base of the door.

Or you can choose vinyl bubble gaskets or threshold-mounted metal as well as special thresholds which work in combination with base-of-door devices.

This is not meant to confuse you, but to indicate the wide choice of weatherstripping materials available for doors.

Look at the cost, consider the physical appearance, the durability and the installation skills required for each type of weatherstripping. Once you determine the style and material that is best for you, follow the manufacturers instructions care fully to assure the installation will keep out the wind and cold.



Window Weatherstripping
All windows—especially those in older homes—should be weatherstripped. You can buy weatherstripping by the length or in complete kits. What you use and how you use it depends on the kind of windows you have.

Double hung windows which slide past each other to open and close, can be weatherstripped with spring metal or vinyl tubes (with or without a sponge core).

Casement, jalousie and awning windows can be weatherstripped with transparent vinyl tape that slips over their edges, or with a special aluminum strip made specifically for casement windows. Both are designed so they won't interfere with opening or closing the windows.

Follow the manufacturers' installation instructions for the most professional and effective job. Be sure you get gasket to gasket contact on all weatherstripping.

While you're at it, check the glazing compound around every window. Loose-fitting panes can be as costly as loose-fitting windows.

If You Have a Generator, PG&E Needs to Know

For safety reasons and to protect your equipment, PG&E needs to know if you have installed your own electric generator as an auxiliary power source.

Without this knowledge, your equipment could be damaged. Also, PG&E linemen need to take certain precautions to protect themselves from possible electric contact.

If you have an electric generator at your home or place of business, please fill out the coupon below and send it with your bill. Or call or write your local PG&E office.

NAME _____

TELEPHONE NUMBER _____

GENERATOR LOCATION _____

PG&E ACCOUNT No. (Optional) _____

Baseline

Continued from page 1

CPUC staff in response to customer concerns.

Here is a table with the old and new Baseline gas and electric quantities for each Baseline geographic territory. (Your Baseline geographic territory is shown on your bill under a dark blue heading called "rate schedule.") Remember, the Baseline electric quantities were increased only for all-electric customers.

For many customers the initial Baseline quantities were much lower than the former Lifeline allowances. Consequently, some customers experienced sizeable bill increases even though there had been no overall net change in PG&E revenues.

The new higher Baseline quantities are intended to adjust Baseline quantities to counteract large bill increases due only to the change to the Baseline system.

"Large bill increases were not contemplated by the State Legislature when it enacted the legislation that created Baseline," says Steve Reynolds, vice president-Rates.

Baseline quantities were developed in a manner consistent with the legislation that created Baseline. PG&E and the CPUC, however, felt that steps had to be taken to ensure that no customers experience large bill increases due to strict interpretation of the legislation. The recent CPUC action is the first step in this process.

All Baseline quantities will be studied by both PG&E and the CPUC as part of PG&E's next general rate case.

Baseline Territory	ALL-ELECTRIC (Kwh) Present Quantity	ALL-ELECTRIC (Kwh) New Quantity	GAS (Therms) Present Quantity	GAS (Therms) New Quantity
Winter				
T	850	960	69	72
V	1100	1160	67	96
W	1000	1000	70	71
X	1000	1190	75	96
R	1200	1200	75	96
S	1200	1200	75	96
Y	1200	1280	62	107
Z	1400	1450	**	**
Summer				
T	390	620	27	40
V	540	740	25	51
W	800	800	18	18
X	400	400	20	20
R	740	740	20	20
S	660	660	20	20
Y	480	620	25	40
Z	400	750	**	**

**Gas not available in this area



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PG&E Progress
Editor: Kathleen R. Hyams
☐ This publication is intended to provide helpful information to our customers. It is not printed at customer expense. The cost is borne by company stockholders out of earnings. ☐ PG&E's rates are determined by the California Public Utilities Commission, based on the cost of fuel, power plants, pipelines and other costs necessary for providing utility service. The cost of this publication is not included in this computation, thus rates are just what they would be if this message had not been printed. ☐ Pacific Gas and Electric Company, Room 1770, 77 Beale Street, San Francisco, CA 94106.

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No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION,
CONSUMERS UNION,
CONSUMER FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS

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No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION,
CONSUMERS UNION,
CONSUMER FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS

Appellees Toward Utility Rate Normalization (TURN), California Public Interest Research Group, Common Cause of California, Consumers Union, and Consumer Federation of California move the Court to dismiss this appeal on the ground that it does not present a substantial federal question. Sup. Ct. R. 16.1(b). This motion also presents several additional reasons why this case should not be set for oral argument. Sup. Ct. R. 16.1(d).

STATEMENT OF THE CASE

Appellees adopt the statement of the case set forth in the Motion To Dismiss concurrently being filed by Appellee California Public Utilities Commission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises out of a temporary and experimental effort by the California Public Utilities Commission (PUC) equitably to apportion the "extra space" in a utility billing envelope between the utility and its customers.[1] After holding in a prior proceeding that this extra space is "ratepayer property"—a holding which is now final under California law—the PUC issued an order permitting TURN to use the extra space in the Pacific Gas & Electric Co. (PG&E) billing envelopes four times a year for the next two years.[2] That order has since been affirmed by the California Supreme Court.[3]

During the eight months of each year when TURN's materials will not be included in the billing envelope, Appellant may use the extra space as it sees fit. During the other four months, it may also make use of any extra space not used by TURN (PUC App. 22); and, even if TURN should utilize all the extra space, Appellant may include additional materials in the envelope if it pays the extra postage. Every TURN insert placed in the billing envelope "shall clearly identify TURN as its source and state

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[1] The PUC has defined the "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." *See* Appendix to the PUC's Motion to Dismiss (hereafter "PUC App.") at 3.

[2] The PUC found in its decision that TURN "represent[s] the interests of a substantial segment of [Appellant's] residential ratepayer population." PUC App. 19.

[3] Although the California Supreme Court did not issue an opinion when it rejected Appellant's constitutional challenges to the PUC's order, it is settled law in California that the denial of a petition for review, even without opinion, "is a decision on the merits both as to the law and the facts presented in the review proceedings." *People v. Western Airlines, Inc.*, 42 Cal. 2d 621, 630, 268 P.2d 723, 728 (1954). The implication in the Jurisdictional Statement and several of the amici briefs that the issues presented by this case have never been considered by a court is thus unfounded.

that its contents have neither been reviewed nor endorsed by [Appellant] or [the] Commission." *Id.* at 39. Funds received by TURN as a result of its billing inserts may be used only for "purposes related to ratepayer representation in Commission proceedings involving [Appellant]." *Id.*

Contrary to Appellant's claim that the California Supreme Court's decision impairs its right to communicate (by displacing its monthly newsletter, the PG&E *Progress*, from the billing envelope in favor of TURN's inserts), Appellant's ability to communicate with its customers has not been restricted. Nothing in the decision prevents Appellant from sending *Progress* (or anything else) to its ratepayers just as it has done in the past. *See* Part I(A), *infra*.

It is theoretically possible, of course, that including both the TURN inserts and *Progress* in the billing envelope during a particular month might require Appellant to pay additional postage. But this possibility does not create a substantial First Amendment claim. To begin with, Appellant failed to show below that the materials which TURN proposes to insert in the billing envelopes will in fact require Appellant to pay additional postage if it wishes to communicate with its customers. Any threat of injury to Appellant is thus wholly speculative and, hence, not ripe for adjudication. *See* Part I(B)(1), *infra*.

Moreover, even if the evidence below had demonstrated that Appellant would inevitably have to pay additional postage as a result of the California Supreme Court's decision, no substantial constitutional question would be presented. At most, the decision would merely shift the postage costs for *Progress*—which until now has been getting a "free ride" in the billing envelope—from Appellant's ratepayers to its shareholders. Such a cost shift merely places Appellant in the same position as all non-utility users of the postal system, who are required to pay their own postage. Requiring Appellant to pay for the cost of communicating its views would hardly work an unconstitutional infringement of its right to speak. *See* Part I(B)(2), *infra*.

Because Appellant has failed to identify any abridgement of its First Amendment freedoms, the PUC's allocation of the extra

space need not satisfy *any* of the traditional tests which this Court has developed to assess official actions which impair First Amendment values. But even if the decision below had some measurable impact on Appellant's First Amendment rights, it would easily pass constitutional muster. Because the decision is "content-neutral," it need not pass the "compelling state interest" test designed for governmental attempts selectively to suppress disfavored kinds of speech. At the very most, then, the only applicable First Amendment standards would be those used for evaluating "time, place and manner" restrictions or regulations having only an incidental effect on speech to which the principles set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), are applicable. *See* Part I(C)(1), *infra*.

The California Supreme Court's decision easily satisfies these standards. It is narrowly tailored to serve numerous important governmental interests: promoting greater participation in PUC proceedings, preventing Appellant's ratepayers from being forced to subsidize the communication of Appellant's messages, providing Appellant's customers with a diversity of views, ending Appellant's monopolization of the economic value inherent in the extra space, and remedying Appellant's prior use of that space in violation of federal law. The decision also leaves open ample alternative means of communication—indeed, Appellant may continue to use the same means of communication that it always has. *See* Part I(C)(2), *infra*.

Nor are Appellant's right not to associate with TURN or its right to remain silent violated by the California Supreme Court's decision. *See* Part II, *infra*. Because the order explicitly requires TURN's materials to identify their source and to disassociate TURN's messages from PG&E, there is no danger that any reader will identify TURN's words with those of Appellant, nor is there any need for Appellant to disassociate itself. Moreover, the Commission and the California courts defined the "extra space" as ratepayer property in a prior proceeding, and that earlier decision, being final, may not be challenged here. Appellant has no right under the First Amendment to prevent California from enforcing third-party access to property which, as a

matter of state law, does not belong to it and which has historically been used as a vehicle for messages both written by the Commission and composed by PG&E to meet Commission requirements.

In addition to the insubstantiality of Appellant's constitutional claims, there are numerous prudential reasons, discussed in Part III, *infra*, why plenary consideration of this case would be inappropriate. There is no conflict in the decisions of the lower courts, nor does the decision below contravene this Court's cases. Moreover, the PUC's order is a temporary experiment, which may be modified if experience shows—which the record does not—that Appellant's ability to communicate will be adversely affected. Because any adverse impact of an access requirement on Appellant's own speech may be quickly averted by modification of the order, consideration of the constitutional issues presented here should occur, if at all, only after the PUC has concluded its experiment and adopted a permanent decree providing access to the billing envelope which has an impact on the exercise of Appellant's First Amendment rights that is established by a proper record.

ARGUMENT

I

APPELLANT HAS FAILED TO SHOW THAT THE CALIFORNIA SUPREME COURT'S DECISION INFRINGES ITS RIGHT TO COMMUNICATE WITH ITS CUSTOMERS THROUGH THE BILLING ENVELOPE.

A. Appellant's Right To Communicate With Its Customers Is Not Limited Or Restricted By The California Supreme Court's Decision.

Appellant's first constitutional challenge to the California Supreme Court's decision affirming the PUC's order is based upon the assertion that the order limits its right to communicate by "either denying or severely restricting appellant's right to disseminate its own information to its customers." J.S. 13. This limitation will occur, Appellant claims, because the TURN

inserts may displace from the billing envelope the PG&E *Progress*, which Appellant states is its "primary means of communicating with its customers." *Id.* at 4. Appellant thus contends that "[w]hether or not [it] will be able to communicate with its customers through the billing envelope" will depend on whether there is any extra space left over after the TURN inserts. *Id.* at 13.

Appellant's professed concern for its ability to communicate has no basis in the facts of this case. Nothing in the decision below bars Appellant from enclosing its newsletter (or anything else) in customer billing envelopes whenever it chooses to do so.[4] During eight months of the year, Appellant may insert *Progress* in the envelope precisely as it has previously done; in those months, the entire cost of that mailing will continue to be borne by the ratepayers.[5] In the remaining four months, Appellant will be similarly free to send *Progress* to its customers, along with TURN's insert, provided only that it pays the additional postage, if any, which the inclusion of *Progress* might require. The California Supreme Court's decision therefore does not impair PG&E's right to communicate with its customers in any way; and, as shown in the next section, the requirement that PG&E pay any additional cost does not raise a substantial First Amendment question.

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[4] Indeed, the PUC has expressly disclaimed any attempt to control Appellant's use of the extra space, as far as the content of its communications is concerned. PUC App. 22, 38. *See also* PUC Motion to Dismiss at 6, 17.

[5] The PUC's present practice is to require Appellant's shareholders to bear the costs of preparing and printing *Progress* (J.S. 4), but to permit Appellant to recover all other costs associated with mailing the newsletter (including postage) from the ratepayers. PUC App. 6-7. Appellant's newsletter thus gets a "free ride" in the billing envelope at the ratepayers' expense. *See* note 7, *infra*.

B. The Speculative Possibility That Appellant's Shareholders—Rather Than Its Ratepayers—Might Be Required To Pay The Cost Of Mailing *Progress* In The Billing Envelope Does Not Raise A Substantial First Amendment Question.

1. Appellant Failed To Demonstrate That The Decision Below Would Result In Any Incremental Expenditure For Its Own Communications.

The only conceivable impact which the decision below might have on Appellant's ability to communicate is that Appellant's shareholders might be required to pay the postage for mailing *Progress* if, during a "TURN month," the TURN inserts and *Progress* consume more than the available extra space. But there is nothing in the record to suggest that this eventuality is likely to occur. Although Appellant contends that its ability to communicate with its customers during the four "TURN months" will be dependent on TURN's "decision as to the length of its message or even the weight of paper it uses" (J.S. 13), Appellant presented no evidence in the proceeding below on these subjects. Nor did Appellant present evidence concerning the amount of extra space in the average billing envelope or the average weight of *Progress*. Indeed, while Appellant cross-examined TURN's executive director and one of its attorneys for the better part of three days, Appellant failed even to inquire how long TURN's inserts would be or what grade of paper it would use. Appellant thus brings this case to the Court on the basis of a factual record which simply fails to support its contention that it will be unable to insert *Progress* into the billing envelope without paying additional expense.[6]

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[6] What evidence exists on this subject indicates that Appellant's ability to use the extra space without incurring additional expense is not in danger. After reviewing the flyer sent out as a result of the PUC's decision in the *UCAN* case (*see* J.S.App. 90-110), TURN's attorney stated that TURN "could develop something that would be very light, much lighter than the *Progress* . . . ." Transcript of Proceedings before the PUC (hereafter "Tr.") 304. The same attorney also stated during the PUC hearing that TURN could abide by a weight limitation of three-tenths of an ounce on its billing inserts. Tr. 393.

In order to establish a constitutional violation, Appellant must show that the "threat of injury" to its First Amendment right to communicate is "both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). That standard has not been met here. Appellant failed to demonstrate below that TURN was likely to consume so much of the extra space that Appellant would necessarily be required to pay additional postage. Thus, in this case, as in *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), there is "[n]othing in the record [which] shows that [Appellant has] sustained any injury thus far, and the law's future effect is wholly speculative." *Id.* at 589. Appellant has therefore failed to establish the first prerequisite of its constitutional claim: that it "has suffered or is immediately in danger of sustaining some direct injury" to its right to communicate. *O'Shea v. Littleton, supra*, 414 U.S. at 494 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). *Cf. Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 543 (1980) (claim by utility commission that prohibition of political bill inserts was necessary to prevent displacement from billing envelope of other, more desirable messages rejected where commission failed to show that presence of political inserts would prevent inclusion of other materials).

2. The California Supreme Court's Decision Would Raise No Substantial Constitutional Question Even If Appellant Had Demonstrated That Its Shareholders Would Be Required To Pay For The Cost Of Mailing *Progress* To Its Customers.

If Appellant had proven below that the California Supreme Court's decision to affirm the PUC's order would inevitably require it to pay additional postage to send *Progress* to its customers, its constitutional claims might be "riper," but they would be no more substantial. For even in that event, the "worst case" effect of the California Supreme Court's decision would simply shift the cost of distributing Appellant's newsletter from its ratepayers to its stockholders—and then for only four of the twelve mailings of *Progress* in each of the next two years.

Even if it had been established by the record, this cost shift would raise no colorable claim under the First Amendment. It

would not impair Appellant's right to communicate nor would it single out Appellant's speech for discriminatory treatment. At most, it would deprive the *Progress* of the "free ride" in the billing envelope it has previously enjoyed, by virtue of Appellant's monopoly status, and force Appellant's shareholders to bear the same expense for mailing *Progress* that all other non-monopoly users of the postal service incur in mailing their messages.[7] However, there is no constitutional bar against requiring Appellant "to pay postage in a manner identical to other Postal Service patrons . . . ." *United States Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114, 127 (1981). For this reason, an order which potentially shifts the cost of mailing *Progress* from Appellant's ratepayers to its shareholders deprives Appellant of no First Amendment rights, but only of its unique ability as a regulated monopoly to force its captive customers—who must of necessity purchase Appellant's services—to pay the mailing expenses of its newsletter.[8]

It is quite plain that the Commission, in the exercise of its established rate-setting authority, could have required in the first

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[7] Professor Tribe has described the "free ride" that utility messages now enjoy as follows:

> "The fact is that the management of the public utility and the shareholders of the public utility get a rather sweet deal. They get to stuff the envelope with their message *at no extra cost to them.* That is, after all, why the message is stuffed in this envelope instead of being separately mailed. It takes a free ride on a fixed resource over which the state gives the utility a monopoly. In this sense, the ratepayers are indirectly forced to subsidize the inclusion of a message with which they may not agree." (J. Choper, Y. Kamisar, and L. Tribe, *The Supreme Court: Trends and Developments* (1979-80) 248 (emphasis added))

[8] Even if PG&E was not merely being deprived of an unjustified "free ride," the fact that Appellant's use of the billing envelope might become more expensive would not render the PUC's decision constitutionally suspect. *See City Council v. Taxpayers for Vincent*, ____ U.S. ____, 52 U.S.L.W. 4594, 4601 n.30 (May 15, 1984) (prohibition of posting signs on public property upheld despite claim that alternative means of communication were more expensive).

instance that costs attributable to mailing *Progress* be charged to Appellant's shareholders, rather than its ratepayers, for rate-making purposes. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 543 (1980) (no reason to assume that commission could not exclude cost of bill inserts from rate base); *id.* at 554-55 (Blackmun and Rehnquist, JJ., dissenting). Indeed, the Court has already rejected a constitutional attack on just such an order. *Rochester Gas & Electric Corp. v. Public Service Commission*, 51 N.Y.2d 823, 413 N.E.2d 359, 433 N.Y.S.2d 420 (1980), *appeal dismissed*, 450 U.S. 961 (1981). Congress, too, has required state utility commissions to consider adopting similar policies. *See* 16 U.S.C. § 2623(b)(5) (requiring state utility commissions to conduct hearings and determine whether to adopt federal standard requiring electric utility shareholders to pay for all direct and indirect costs of the utilities' promotional and political advertising). An order explicitly requiring Appellant's shareholders to bear these costs would have been *more* burdensome to PG&E than the order it complains of,[9] yet such an order would be no more than a typical example of state economic regulation which must be upheld if supported by a rational basis (*see, e.g., City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963)), and which would raise no First Amendment issue. *A fortiori*, the California Supreme Court's decision in this case—which Appellant has not shown will result in *any* increased postage—does not violate the First Amendment.[10]

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[9] Instead of requiring PG&E to pay *all* postage costs for *Progress*, the PUC has required it to pay such costs *at most* only four months per year, and then only if the TURN inserts consume all the extra space.

[10] Requiring Appellant's shareholders to pay for *all* costs associated with mailing *Progress* would not only be constitutionally *permissible*, but might also be constitutionally *required*, under the rule set forth in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). This issue was left open in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 543 n. 13 (1980), and similarly is not presented here. However, the fact that Appellant may be constitutionally compelled to shoulder the entire cost of mailing *Progress* quite clearly illustrates the insubstantiality of the claim that its First Amendment rights are being violated merely because the PUC's order poses a speculative threat that Appellant might have to incur such expense.

C. The California Supreme Court's Decision Passes Constitutional Muster Under The First Amendment Standards Applicable To "Content-Neutral" Regulations.

The foregoing analysis would justify dismissal of this appeal without subjecting the California Supreme Court's decision to *any* of the traditional tests used for evaluating official action which has a demonstrable impact on First Amendment rights. The decision below neither impairs Appellant's ability to communicate regarding specifically-proscribed issues nor imposes any restriction on when, where or how Appellant may engage in expressive activity. Thus, *both* the rigorous "compelling state interest" test used to evaluate statutes or regulations which are "based either upon the content or subject matter of speech" (*Regan v. Time, Inc.*, ____ U.S. ____, 52 U.S.L.W. 5084, 5086 (July 3, 1984)), *and* the more relaxed standards applied to "viewpoint neutral" regulations (*see, e.g., Clark v. Community for Creative Non-Violence*, ____ U.S. ____, 52 U.S.L.W. 4986 (June 29, 1984)) are irrelevant to this case. But because Appellant contends that the PUC's decision must satisfy the most demanding level of First Amendment scrutiny (J.S. 18-20), we shall briefly discuss these traditional First Amendment tests. We shall first respond to Appellant's contention that the decision below is content-based and therefore must be precisely drawn to serve a compelling state interest (*see* Part I(C)(1), *infra*) and then evaluate the decision under the "time, place and manner" standards and the principles enunciated in *United States v. O'Brien*. *See* Part I(C)(2), *infra*.

1. The Decision Below Is "Content-Neutral" And Therefore Need Not Satisfy The Most Demanding Level Of First Amendment Scrutiny.

The most rigorous level of First Amendment analysis is utterly irrelevant here. Such analysis is reserved for government regulation of speech which "discriminate[s] on the basis of content" (*Regan v. Time, Inc., supra*, 52 U.S.L.W. at 5087), and there is no such discrimination in this case. To the contrary, the decision

below is "content-neutral," since it leaves Appellant free to communicate on any or all subjects. For this reason, the opinion which accompanied the PUC's order contained no evaluation of the wisdom or desirability of either Appellant's speech or that of TURN. Indeed, the PUC explicitly *rejected* Appellant's invitation to evaluate the merits of its speech.[11]

Appellant nevertheless contends that the PUC's order was based upon its value judgment that permitting TURN to utilize the extra space on a limited, experimental basis would use that space "more efficiently for the rate-payers' benefit" than if the space continued to be monopolized by Appellant. J.S. 17 (citing J.S. App. 21). Appellant urges that the PUC's judgment as to how the extra space could be used "more efficiently" necessarily rested upon its determination that TURN's speech was "more important" than that of Appellant. *Id.*

Appellant's argument confuses a bias in favor of TURN's speech—which the PUC at no time exhibited—with a preference for more speakers. The PUC was not required to, and did not, evaluate the competing merits of Appellant's and TURN's envelope inserts in concluding that permitting two speakers to utilize the extra space, rather than one, would serve the ratepayers' interests. PUC App. 27-28. The Commission's explicit finding

[11] Appellant attempted to introduce evidence before the PUC that "readers of *Progress* rated the quality of . . . articles quite favorably; that the readers find the information useful, that the percentage of the readers that find the information useful is at the percentage of approximately 87% . . . that the *Progress* deals mostly with conservation issues and that the overall readership and receipt of these conservation articles is very good in that 88% call energy conservation advice in *Progress* excellent or very good." Tr. 597. TURN objected to the introduction of this evidence on the ground that it was irrelevant, precisely because the Commission was not engaging in balancing the merits of Appellant's speech versus TURN's. *Id.* at 584. The PUC's administrative law judge excluded the evidence and the PUC affirmed this ruling. PUC App. 9-11. Thus, with supreme indifference to the irony of its sudden about-face, Appellant now accuses the PUC of doing precisely what it unsuccessfully requested the PUC to do in the proceedings below. Appellant has managed to be wrong on both occasions.

that consumers "will benefit more from exposure to a wide variety of views than they will from only that of PG&E" (PUC App. 22) is not an official disparagement of Appellant's speech but simply an endorsement of diversity over exclusivity.[12] The PUC's order therefore did not involve an evaluation of Appellant's speech or that of TURN and neither, of course, did the California Supreme Court's affirmance of the order.

Because the decision below is content-neutral, this Court need not determine whether it "is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Commission, supra,* 447 U.S. at 540. Thus, the decision is subject to First Amendment scrutiny, if at all, only under the less demanding tests applicable to government regulations, such as "time, place, and manner" restrictions, that "are justified without reference to the content of the regulated speech . . . ." *Clark v. Community for Creative Non-Violence, supra,* 52 U.S.L.W. at 4987.

2. The PUC's Order Is Narrowly Drawn To Further Important Governmental Interests And Leaves Appellant With Ample Alternative Means Of Communication.

Content-neutral regulations of speech are constitutional if "they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." *Id.* Assuming *arguendo* that *any* degree of judicial scrutiny is required (*but see* Part I (C)(1), *supra*), the PUC's order easily passes this test.

To begin with, the order is "narrowly tailored" to serve at least four governmental interests which are certainly significant and which may well be compelling. *First*, the order is intended to

[12] The PUC's desire to expose ratepayers to several viewpoints is obviously consistent with the First Amendment, which, as the Court has stated on numerous occasions, was designed not only to bar government encroachment on freedom of speech, but affirmatively to encourage "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States,* 326 U.S. 1, 20 (1945). *See also Buckley v. Valeo,* 424 U.S. 1, 93 and n.127 (1976); *CBS, Inc. v. FCC,* 453 U.S. 367, 396 (1981).

promote "the most complete understanding possible of energy-related issues" (PUC App. 27), by opening up the billing envelope to a multiplicity of voices. *Second*, the order is designed to further the "fullest possible consumer participation in CPUC proceedings . . . ." *Id. Third*, the order is intended to prevent Appellant from arrogating to itself the economic value of the extra space, which the PUC had previously determined to be ratepayer property. *Id.* at 26, 28, 32. *Fourth*, and finally, the order was fashioned as a remedy for Appellant's violation of federal law, a violation which the PUC found to exist in the general rate proceeding which led to this case. *Id.* at 8; *see also* J.S. App. 67, 69-71.

There is little doubt that these interests are constitutionally sufficient to support the PUC's decision. There is unquestionably a substantial state interest in expanding the nature and range of the information available to ratepayers, through opening the extra space in the billing envelope to a multiplicity of voices. *See* note 12, *supra*. Furthering the ability of groups such as TURN to participate in PUC proceedings similarly enhances the democratic process and results in more informed decisions, as well as providing economic benefits to the groups whose interests will be served by such representation.[13] The PUC's attempt to prevent Appellant from monopolizing the extra space also furthers the

[13] The PUC specifically found in its *UCAN* decision (and it reiterated this finding in the decision below) that "participation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff." PUC App. 36; *see also* J.S. App. 95 (*UCAN* decision). The importance of encouraging wider participation in state utility commission ratemaking has also been recognized by Congress. In enacting the Public Utility Regulatory Policies Act (PURPA), one of Congress' primary goals was to encourage intervention by electric consumers in ratemaking proceedings. *See* 16 U.S.C. § 2631 (granting "any electric consumer of an affected electric utility" the right to "intervene and participate as a matter of right in any ratemaking proceeding" conducted by a State regulatory authority), § 2632 (attorney's fees), § 2633 (judicial review).

important constitutional objective of preventing the forced subsidy by the ratepayers of Appellant's communications, in possible violation of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).[14] Finally, the PUC's decision serves the obviously substantial interest of remedying Appellant's prior failures to comply with the federal standard set forth in PURPA preventing utilities from saddling their ratepayers with the direct or indirect costs of political advertising.

Appellant's submission on this point is utterly lacking in substance. Although it baldly asserts that the first two interests identified above—promoting participation in PUC proceedings and providing more information to ratepayers—are not compelling (J.S. 23), that is not the relevant inquiry. *See* Part I(C)(1), *supra*. Moreover, Appellant's *ipse dixit* is no substitute for a sensitive analysis of these two governmental interests, let alone a demonstration that they are not "significant," "important," or even "compelling." And because the remainder of Appellant's discussion of this issue rests entirely upon a single, irrelevant sentence from *Buckley v. Valeo*, Appellant fails even to discuss the other two interests served by the decision below.[15]

The PUC's order is also "narrowly tailored" to further the interests described above. It is readily apparent that the best

[14] The Court in *Consolidated Edison* clearly indicated that the New York PSC would be justified in adopting measures to remedy the problem of forced subsidization by the ratepayers of a utility's communications, even if the remedy was to exclude the cost of the utility's envelope inserts from the rate base altogether. *See* 447 U.S. at 543; *id.* at 544 (Marshall, J., concurring); *id.* at 551-54 (Blackmun and Rehnquist, JJ., dissenting). Indeed, elimination of the forced subsidy may not only be constitutionally permissible, but also constitutionally required. *See* note 10, *supra*.

[15] Appellant cites *Buckley v. Valeo*, 424 U.S. 1 (1976), for the proposition that "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others . . . ." *Id.* at 48-49. But this principle is inapplicable to this case, because no speech of Appellant's has been suppressed, nor (as was true in *Buckley*) have any restrictions been imposed on the amount Appellant may expend to disseminate its own views. *See* Part I(A), *supra*.

available method for ending Appellant's monopolization of the billing envelope extra space is to permit more than one entity to have access thereto.[16] Similarly, permitting TURN to solicit funds in the billing envelope—and requiring it to use the funds thereby generated in PUC proceedings relating to Appellant's rates—is undoubtedly an effective means of furthering TURN's participation in PUC proceedings.[17] By enabling a representative of Appellant's residential ratepayers to use the extra space, the decision effectively prevents Appellant from arrogating the economic value of the extra space entirely to itself, as well as remedying Appellant's prior, unlawful use of that space to subsidize its political communications.[18]

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[16] Appellant speculates that exposing the ratepayers to a diversity of views could be served by publicly funding mailings by consumer groups. J.S. 24. This alternative, however, does not solve the economic and constitutional problems created by permitting Appellant to monopolize property which California law holds belongs to the ratepayers. Moreover, it is possible that a communication included in a billing envelope has a greater likelihood of being read by the recipient than one enclosed in a separate mailing.

[17] While Appellant contends that the purpose of promoting participation in PUC proceedings could be equally well served by awarding attorney's and expert witness' fees, it has not attempted to rebut the showing which TURN made below that because such fees are only awarded after the fact (and often after lengthy delays until a proceeding becomes final), they do not enable financially pressed groups such as TURN to hire the expert witnesses and attorneys they need. *See Ex.* 1 at 6.

[18] Even if Appellant could suggest some alternative to the PUC's decision which this Court might surmise would have less of an impact upon Appellant's alleged First Amendment rights, that would not warrant invalidation of the PUC's judgment. In the absence of the strictest level of First Amendment scrutiny, the Court may not substitute its assessment of how best to further the interests served by the decision below for that of the PUC. *See Clark v. Community for Creative Non-Violence, supra,* 52 U.S.L.W. at 4989. Indeed, "[t]he less-restrictive-alternative analysis invoked by [Appellant] has never been a part of the inquiry into the validity of a time, place, and manner regulation. It is enough that the . . . restriction substantially serves the

It also is obvious that the California Supreme Court's affirmance of the PUC's order leaves Appellant with "ample alternative channels for communication" of whatever information it wishes to communicate. *Clark v. Community for Creative Non-Violence, supra,* 52 U.S.L.W. at 4987. As noted in Part I(A), *supra,* the decision below does not inhibit Appellant's ability to communicate in any way. Indeed, the decision leaves Appellant with precisely the same channels for communicating its views that it has always used—including the insertion of its messages in the customer billing envelopes. Because Appellant has more than ample opportunities to "reach the minds of willing listeners" (*Kovacs v. Cooper,* 336 U.S. 77, 87 (1949)), the decision below meets the tests applicable to content-neutral regulations.[19]

Government's legitimate ends." *Regan v. Time, Inc.,* ___ U.S. ___, 52 U.S.L.W. 5084, 5089 (July 3, 1984) (plurality opinion). For the reason stated in text, it is patent that the PUC's decision "substantially serves" the interests indentified by the PUC.

[19] Since the decision below meets the standard enunciated in this Court's cases for "time, place and manner" restrictions, it necessarily meets the "four-factors standard of *United States v. O'Brien, supra,* for validating a regulation of expressive conduct, [a standard] which, in the last analysis is little, if any, different from the standard applied to time, place, and manner restrictions." *Clark v. Community for Creative Non-Violence, supra,* 52 U.S.L.W. at 4989. If a content-neutral restriction "sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O'Brien* on the ground that the governmental interest is insufficient to warrant the intrusion on First Amendment concerns or that there is an inadequate nexus between the regulation and the interest sought to be served." *Id.* at 4989 n.8.

II

THE CALIFORNIA SUPREME COURT'S DECISION DOES NOT COMPEL APPELLANT TO SUBSIDIZE SPEECH WITH WHICH IT DISAGREES, ALLOW OTHERS TO USE ITS "PROPERTY" TO DISSEMINATE THEIR MESSAGES, OR INFRINGE ON APPELLANT'S EDITORIAL CONTROL OVER ITS OWN SPEECH.

Appellant makes a variety of additional claims against the California Supreme Court's affirmance of the PUC order requiring it to include TURN's inserts four times per year. It invokes *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), for a variety of generalized propositions which, on careful analysis of the facts of *this* case, are wholly inapposite.

To see why this is so, it is useful to understand what is—and what is not—before the Court on this appeal. To do so, it is necessary to describe an important aspect of the procedural history of this controversy.

In 1981, the PUC determined that the "extra space" in the billing envelope has "economic value" which is "paid for . . . by ratepayers" (Decision 93887, J.S. App. A-67, A-72, ¶ 58) and that, as a result, the extra space "is properly considered as ratepayer property." *Id.* A-72, ¶ 58. This finding was necessary to the PUC's decision that Appellant's use of the extra space for mailing *Progress* was "improper" and in violation of PURPA (*id.* A-72, ¶ 59; A-67) and that such use "deprives the ratepayers of[] the economic value of the 'extra' space in the billing envelope." *Id.* A-72, ¶ 59. Appellant unsuccesfully sought a rehearing of Decision 93887, attacking these very findings. But it did not seek review of that decision either in the California Supreme Court or in this Court. [20]

[20] There was a petition for review of Decision 93887, but it was filed by TURN, not PG&E. PG&E responded to the petition by saying that if review were granted the court should also review the PUC's finding that the extra space in the billing envelope was ratepayer property. The California Supreme Court denied TURN's petition.

Under California law, those findings cannot be relitigated now that the California Supreme Court has declined review and the PUC decision has become final. *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630-31, 268 P.2d 723, 728 (1954); *Consumers Lobby Against Monopolies v. PUC*, 25 Cal 3d 891, 901, 160 Cal. Rptr. 124, 129, 603 P.2d 41, 46 (1979) ("[O]ur denial of such a petition raises the bar of res judicata against relitigation of the same cause of action between the same parties or their privies"); *see also* Cal. Pub. Util. Code § 1709 ("In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive").

In accordance with those established rules of California law, the PUC held in the instant case that its prior Decision 93887 had already determined that the extra space had economic value and belonged to the ratepayers (PUC App. 33, Findings of Fact ¶¶1, 3, 4) and that these findings "should not be relitigated in this proceeding." *Id.* at 36, Concl. of Law ¶1; *see also id.*, ¶2. In seeking a writ of review in the California Supreme Court, Appellant complained that the PUC had erred, under California law, in precluding it from relitigating those issues in the present case. *See* Reply Brief In Support of Petition For Writ of Review of Pacific Gas and Electric Company at 34-42. The California Supreme Court denied review, however, and its affirmance of the PUC's refusal to permit relitigation of an issue of *state* law settled in a prior, and now final, proceeding plainly rests upon an independent and adequate non-federal ground.

Accordingly, for purposes of this Court's determination of PG&E's appeal, the issue of whether California properly has treated the extra space in the billing envelope as ratepayer property is not properly presented here. At this juncture, then, the issue to be determined is whether, in light of that earlier determination that the extra space in the billing envelope is *not* the property of PG&E but belongs to the ratepayers, California can require PG&E to use the ratepayers' extra space to transport TURN's mailings four times per year without transgressing the principles established in *Abood v. Detroit Board of Education*,

supra, Wooley v. Maynard, supra, or *Miami Herald Publishing Co. v. Tornillo, supra.*

Appellant makes only a fleeting reference to *Abood.* That decision confirms that the state may not compel a citizen "to contribute [financially] to the support of an ideological cause he may oppose . . . ." 431 U.S. at 235. This salutary principle is simply not implicated in this case. As the PUC found, the costs of mailing the billings are borne not by PG&E but by the ratepayers (PUC App. 36, Finding of Fact ¶ 27), and all additional costs of printing and inserting TURN's billing inserts must be reimbursed by TURN. PUC Order ¶ 5(d), PUC App. 38-39. In any event, because the "extra space" in the billing envelope was conclusively found in the prior PUC proceeding to be *ratepayer* property, there is no basis for PG&E's assertion that *its* property is being used in a manner that constitutes a form of coerced subsidy.

PG&E's claim that the PUC's decision is infirm under *Wooley v. Maynard, supra* is answered by this Court's rejection of a similar claim in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980):

> "Appellants finally contend that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others. They state that in *Wooley v. Maynard,* 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977), this Court concluded that a State may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. This rationale applies here, they argue, because the message of Wooley is that the State may not force an individual to display any message at all.
>
> "Wooley, however, was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used 'as part of his daily life,' and refused to permit him to take any measures to cover up the motto even though the Court

> found that the display of the motto served no important state interest. Here, by contrast, there are a number of distinguishing factors. Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." (*Id.* at 85-87)

In the present case, as in *PruneYard*, there is no danger that the views of TURN will be misidentified as those of PG&E. Indeed, the PUC has taken pains to ensure that no such confusion will occur by requiring that each insert "clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission." PUC Order ¶ 5(e), PUC App. 39. Moreover, again as in *PruneYard*, the state has dictated no specific message, and thus there is "no danger of governmental discrimination for or against a particular message." And, as in *PruneYard*, PG&E remains free to disavow any connection with TURN's inserts, although the PUC-mandated disclaimer which TURN itself must include presumably makes it unnecessary for PG&E to do so.

The one factual element which differentiates this case from *PruneYard*, far from supporting Appellant, further undercuts its analogy to *Wooley*. In *Wooley* and in *PruneYard*, the message which was objected to had to be displayed on the citizen's own

property.[21] Here, by contrast, it is conclusively established for purposes of this appeal that the extra space in the billing envelope is *not* PG&E's property. Since PG&E is required to support TURN's message with neither its property nor its pocket book, its analogy to *Wooley* lacks substance.

Appellant seeks to distinguish *PruneYard* on the ground that while a shopping center is not limited to the use of its owners, a billing envelope is. J.S. 16. In fact, the comparison cuts the other way. A shopping center, at least prior to *PruneYard*, was private property over which the owner could exercise virtually unfettered control; and shopping center owners frequently exercised that power to bar all dissemination of handbills and other forms of speech. *See PruneYard, supra*, 447 U.S. at 80; *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (upholding outright ban on expressive activity). By contrast, Appellant is a regulated utility, and for many years has printed and disseminated a host of notices *required by the PUC*, without regard to whether it agreed with them or not. *See* PUC App. 6-8 (listing history of PUC-required inserts); *see also* PUC Motion to Dismiss at 10-14.

This Court's decisions since *PruneYard* refute Appellant's contention that the Constitution confers upon a utility exclusive control over the contents of the billing envelope. In *Consolidated Edison Co. v. Public Service Commission, supra*, the state utility commission sought to defend its prohibition of utility political messages on the ground that the billing envelope could accommodate "only a limited amount of information," and that political messages might displace other desirable envelope inserts. *Id.* at 542. The Court, however, rejected this argument, stating that there was nothing in the record showing that "the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison *might be ordered lawfully to include in the billing envelope.*" *Id.* at 543 (emphasis added). Similarly,

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[21] Thus, in *PruneYard*, the Court summarized the First Amendment claim as "that a *private property owner* has a First Amendment right not to be forced by the State to use *his property* as a forum for the speech of others." 447 U.S. at 85 (emphasis added).

in *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980), the Court invalidated a utility commission order prohibiting utilities from promoting electricity use on the ground, *inter alia*, that the state's goal of promoting conservation could be adequately protected by requiring that the utility's advertisements contain specified conservation-related information. *See id.* at 572. If a state constitutionally may require a utility to include a government-sponsored message in its advertisements, *a fortiori* there is no constitutional barrier to requiring that the utility envelope be opened for the messages of third parties. *See PruneYard, supra*, 447 U.S. at 87 (compelling display of a state-prescribed message requires greater justification under First Amendment than requiring the opening of a shopping center to a large number of diverse messages).[22]

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[22] There is certainly no general principle of law that a corporation such as Appellant may not be required to serve as a conduit for the messages of others. The SEC's proxy rules, for example, require covered corporations to include in their proxy materials certain shareholder proposals and statements in support thereof. Rule 14a-8(b)(1), 17 C.F.R. § 240.14a-8(b)(1). Such shareholder proposals may concern matters of great public controversy, discussion of which clearly enjoys First Amendment protection. *See, e.g., SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972) (shareholder resolution relating to use of company's product in Vietnam); *see also First National Bank v. Bellotti*, 435 U.S. 765, 794 (1978) ("Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues"). The constitutionality of these rules has never been questioned.

There are also a host of situations in which government directly requires private parties to communicate specified messages themselves. *See, e.g.*, 15 U.S.C. §§ 77j, 77aa (listing material required to be included in securities prospectuses); 15 U.S.C. § 1333 (requiring prescribed health warning to appear on all cigarette packages); 15 U.S.C. § 1637 (requiring specified disclosures for open end consumer credit plans); 15 U.S.C. §1638 (requiring specified disclosures for other consumer credit transactions). *See also Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 571 (1980) (utility commission could require utility to include specified information in its advertisements).

The third case on which PG&E relies, *Miami Herald Publishing Co. v. Tornillo, supra,* is equally far from the mark. In *Tornillo,* the Court held unconstitutional a statute granting political candidates a right to equal newspaper space for reply to criticism or attacks on the candidate's record published in a newspaper. In the present case, TURN has been granted no right to invade the pages of PG&E's newspaper *Progress.* Nor is its right of periodic access to the *ratepayers'* property—the extra space in the billing envelope—triggered by the particular content of PG&E's speech in *Progress.* This Court's rejection of a similar claim in *PruneYard* thus disposes of PG&E's assertion here:

> "Tornillo struck down a Florida statute requiring a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. It rests on the principle that the State cannot tell a newspaper what it must print. The Florida statute contravened this principle in that it 'exact[ed] a penalty on the basis of the content of a newspaper.' 418 U.S. at 256. There also was a danger in Tornillo that the statute would 'dampe[n] the vigor and limi[t] the variety of public debate' by deterring editors from publishing controversial political statements that might trigger the application of the statute. *Id.* at 257. Thus, the statute was found to be an 'intrusion into the function of editors.' *Id.* at 258. These concerns obviously are not present here." (447 U.S. at 88)

III

THE COURT NEED NOT GIVE PLENARY CONSIDERATION TO THIS CASE BECAUSE THE PUC'S ORDER PROVIDES ONLY TEMPORARY ACCESS TO THE BILLING ENVELOPE, MAY BE MODIFIED IN THE EVENT OF SUBSTANTIAL INTERFERENCE WITH APPELLANT'S FIRST AMENDMENT RIGHTS, IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR THOSE OF ANY OTHER COURT, AND DEPENDS ON FACTORS WHICH MAY NOT BE PRESENT IN OTHER CASES.

In addition to the insubstantiality of the constitutional claims presented, there are additional, prudential reasons why plenary consideration of this case would be an unwise use of the Court's resources. These reasons concern, first, the temporary and experimental nature of the relief granted below; second, the absence of any conflict between the California Supreme Court's decision in this case and the decisions of this Court or those of any other court; and third, the unique facts of this case which make it an inappropriate vehicle for resolving the constitutional claims presented by Appellant.

The effect of the decision below is to provide TURN with limited access to the billing envelopes over a two-year period. The PUC explicitly retained jurisdiction to issue "further clarifying orders" in the event problems develop with the implementation of its decision (PUC App. 24), and it required TURN to file two reports mid-way through and at the end of the two-year period. *Id.* at 23. Thus, the PUC has reserved jurisdiction to modify the order if it has a greater impact on Appellant's ability to communicate than Appellant has so far been able to demonstrate,[23] and it will obviously undertake a complete re-evaluation

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[23] To take one obvious example of the kind of ameliorative order that the PUC could issue, one of TURN's attorneys indicated during the proceedings below that TURN could abide by a reasonable weight limitation on the materials it inserts in the billing envelope. Tr. 392-93. Although the PUC did not require TURN to submit to any such limitation, it is obviously within the PUC's power to adopt a weight

of the merits and demerits of providing access once the experiment is over. For this reason, even if the PUC's decision were to result in an actual impairment of Appellant's ability to communicate—which, for the reasons stated above, is most improbable—any impairment could be quickly remedied. "The potential for such administrative solutions confirms the conclusion that the . . . issue . . . simply is not ripe for judicial resolution." *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 297 (1981).[24]

Nor does the California Supreme Court's affirmance of the PUC's order contravene any decision of this Court. *Cf.* Sup. Ct. R.17.1(c) (certiorari will be granted when a state court "has decided a federal question in a way in conflict with applicable decisions of this Court"). While Appellant (at J.S. 10-11) asserts that a conflict exists between the ruling below and the Court's decisions in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), and *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), Appellant's claim ignores the critical difference between those cases and this one: that, while attempts were made in both of the prior cases to suppress utility speech, the PUC has not in this case impaired Appellant's communicative rights in any

limit in the event that its access decision imposes undue financial burdens on Appellant's own speech.

[24] The constitutional claims discussed in Parts I and II, *supra*, may come to the Court with somewhat different degrees of ripeness. As noted in text, Appellant's claim that the decision below impairs its right to communicate is premature, because Appellant has failed to show that such impairment has occurred or will occur or that the PUC could not remedy any impairment that might occur. The claims discussed in Part II, by contrast, do not depend on the effect of the PUC's order as applied; they turn, instead, on its facial validity. While these latter contentions are thus ripe for adjudication, they are so insubstantial, and so obviously foreclosed by the prior decisions of the Court, that plenary consideration of these contentions alone would be a waste of time.

way.[25] *See* Part I(A), *supra*. The decision below therefore does not conflict with any decision of this Court, and even Appellant does not suggest that a conflict exists with a decision of any other court.

Finally, there are two peculiarities in the factual record of this case which affect the constitutional balance here and which may make this case atypical of the several controversies brewing in other states between utilities and groups seeking access to the billing envelope. As noted above, there is in this case a prior determination, final as a matter of state law, that the extra space in the billing envelope belongs to the ratepayers, not the utility. *See* pp. 18-19, *supra*. This appeal therefore does not present the constitutional questions that would be raised if a state sought to enforce access to a utility billing envelope that was clearly recognized as utility property under state law, such as the question of whether such enforced access constitutes a "taking" of utility property for which the Fifth Amendment requires just compensation.[26] Moreover, and perhaps even more unique to this

[25] In fact, statements in the Court's opinions in both *Consolidated Edison* and *Central Hudson* strongly support the propriety of the decision below. *See* pp. 22-23, *supra*.

[26] Contrary to the assertion of some amici curiae, no Fifth Amendment claim is presented by the Jurisdictional Statement, nor is such a claim "fairly included therein." Sup. Ct. R. 15.1(a). Indeed, Appellant asserts that the question of who owns the extra space "is irrelevant when measuring state regulation against required constitutional standards." J.S. 22. Since the Fifth Amendment claim was presented below as a separate and independent basis for the asserted invalidity of the PUC's order (*see* J.S. 7, 8), Appellant's failure to raise the issue in this Court plainly constitutes an "intentional relinquishment" of review by this Court of the California Supreme Court's rejection of Appellant's Fifth Amendment claim.

Moreover, even if this contention had been presented by the Jurisdictional Statement, the California Supreme Court's decision that there was no unconstitutional "taking" in this case plainly rests upon an adequate, non-federal ground. As noted in text, the California courts determined in a prior proceeding that the extra space is ratepayer property, not that of Appellant, and no review of that decision was sought in this Court. Appellant cannot now claim compensation under

case, the decision below was intended to remedy a prior and (and final) determination that Appellant had violated federal law by recouping some of the costs for its political advertising from the ratepayers, in violation of a PURPA standard which the PUC had adopted. *See* p. 14, *supra.* Since a pre-existing violation of law may warrant the imposition of equitable relief which might not otherwise be constitutionally permissible (*Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 52 U.S.L.W. 4767 (June 12, 1984)), plenary consideration of the PUC's decision in this case would not necessarily resolve the constitutional claims raised by utilities where no prior violation of federal law had been established.

In summary, the constitutional claims presented by Appellant are not ripe for review at this juncture and there is no assurance that they ever will become so. The decision below neither contravenes decisions of this Court nor conflicts with decisions from other courts. The decision below also turns on factors which may be unique to this case. Plenary consideration of the case is thus unwarranted.

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the Fifth Amendment for the "taking" of property which state law has conclusively determined never belonged to it in the first place.

CONCLUSION

Appellees TURN, California Public Interest Research Group, Common Cause of California, Consumers Union, and Consumer Federation of California respectfully submit that the question presented in Appellant's Jurisdictional Statement is so insubstantial as not to need further argument, and therefore respectfully move the Court to dismiss the the appeal for want of a substantial federal question.

DATED: March 1, 1985.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,

Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS

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No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,
Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS

Appellee, the Public Utilities Commission of the State of California, respectfully moves the Court for an order dismissing this appeal on the ground that it does not present a substantial federal question.

OPINIONS BELOW

The opinions below are correctly set forth in the Jurisdictional Statement.[1]

[1] The Commission's initial majority opinion in Decision No. 83-12-047 (Dec. 20, 1983) and its subsequent modifying opinion in Decision No. 84-05-039 (May 2, 1984) are separately reproduced in the Appendix to the Jurisdictional Statement ("J.S. App."), at A1-A34 and A45-

JURISDICTION

The judgment of the California Supreme Court became final and was entered on November 4, 1984. Cal. R. Ct. 24(a). The notice of appeal was timely filed in the California Supreme Court on November 5, 1984. This Court's appellate jurisdiction is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides in part:

> Congress shall make no law . . . abridging the freedom of speech . . . .[2]

The relevant state constitutional and statutory provisions conferring regulatory authority on the Commission are reproduced in the Appendix hereto ("App."), at A57-A59.

STATEMENT OF THE CASE

Factual Background

Pacific Gas and Electric Company ("PG&E"), a regulated "public utility" within the meaning of Cal. Const. art. XII, § 3, and Cal. Pub. Util. Code § 216, bills its customers for utility service each month by mail and recovers its reasonable costs of billing, including postage, materials, labor and overhead, in rates.

As a necessary and proper part of the billing process, PG&E encloses in each customer's billing envelope a bill, a return

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A54, respectively. For the convenience of the Court, a single conformed copy of the Commission's decision *as modified* is reproduced in the Appendix hereto ("App."), at A1-A40.

[2] The First Amendment guarantee of free speech is made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

envelope and such additional bill inserts as are required by statute[3] or by the Commission.[4]

Based on present requirements established or approved by the Commission, PG&E's billing envelope and its required contents, taken together, normally weigh a fraction of an ounce.[5] However, present regulations of the United States Postal Service require prepaid postage on each billing envelope in an amount sufficient to cover the delivery of mail weighing a full ounce. Accordingly, PG&E's present billing and postage requirements generate a quantum of weight allotment in the envelope, not normally consumed by the bill or the enclosures otherwise required by the Commission, upon which postage has been prepaid. For convenience, the Commission has characterized this prepaid quantum of weight allotment as the "extra space" in the billing envelope.[6]

PG&E has traditionally communicated with its customers by enclosing its publication *Progress* in the extra space in the billing envelope. The costs of preparing and printing *Progress* are not included in rates and thus are effectively paid by the company's shareholders. However, under present practice, PG&E recovers 100 percent of its estimated postage costs for billing from the ratepayers. It thus recovers in rates the cost of that postage applicable to the extra space, including that portion of the space occupied by *Progress*. In this way, the ratepayers involuntarily subsidize the delivery of PG&E's speech.

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[3] *E.g.*, Cal. Pub. Util. Code §§ 454(a), 786(b) and 786(c).

[4] *See* note 17, *infra*.

[5] The cumulative weight of these items will of course vary, depending on the number and nature of inserts required for a given month as well as any variations in the billing requirements for individuals or different classes of customers.

[6] The Commission's decision defines the "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." App. A3.

Moreover, the extra space has economic value to the ratepayers far in excess of its applicable postage costs. If that space were used to generate income—*e.g.*, by selling the use of the space to advertisers—the income generated would likely be very substantial.[7] Such income would engender a corresponding reduction in PG&E's revenue requirement and thus in rates. Accordingly, the exclusive appropriation of the extra space by PG&E without charge results in PG&E's obtaining a windfall from the ratepayers measured by the economic value of the space. Otherwise stated, the failure to exploit fully the economic value of the extra space for the benefit of ratepayers results in the ratepayers' loss of opportunity costs for a medium of communication which they underwrite.

Prior Decisions

In an earlier decision, Decision No. 93887 (Dec. 30, 1981), as modified by Decision No. 82-03-047 (Mar. 2, 1982), the Commission considered the claim of Toward Utility Rate Normalization ("TURN"), a frequent intervenor in Commission proceedings, that PG&E had violated the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 2623(b)(5) and 2625(h), by recouping from ratepayers indirect expenditures for political advertising *(i.e., Progress)* in the billing envelope. J.S. App. A67, A72.

The Commission concluded that the economic value of the extra space in the billing envelope should be "considered as ratepayer property," since the ratepayers create that value by paying the postage for delivery of the entire contents of the envelope. J.S. App. A67. The Commission further concluded that PG&E's insertion of *Progress* in the envelope captured that economic value without charge to PG&E in violation of PURPA.

[7] There are, of course, legitimate reasons why the Commission might find the sale of advertising space objectionable. Such use would do little to increase public awareness of regulatory issues or public participation in the Commission's proceedings. Similarly, placing the utility bill in a sheaf of advertisements might impede the convenience and efficiency of the billing process.

Id. However, rather than deciding in that proceeding "what steps [it] should take to utilize most efficiently for the ratepayers' benefit the 'extra' space . . . in the billing envelope," J.S. App. A69, the Commission invited the initiation of a collateral proceeding addressing the question of remedy:

> We invite TURN or any other interested party to file an application with this Commission with a proposed solution to the extra space problem. The application would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the "extra space" more efficiently for ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such application.

J.S. App. A71.[8]

Thereafter, in Decision No. 83-04-020 (Apr. 6, 1983) ("the UCAN decision"), the Commission authorized the establishment of a consumer advocacy group to be called San Diego Utility Consumers Action Network, Inc. ("UCAN") and required San Diego Gas and Electric Co. ("SDG&E") to allow the group to use the extra space in its billing envelope four times per year for a two-year period. J.S. App. A90-A110. SDG&E did not challenge the Commission's final order in the courts, and UCAN has utilized SDG&E's billing space on several occasions to solicit membership and funds.

The Decision Below

TURN responded to the Commission's invitation issued in Decision No. 93887 and, on May 31, 1983, filed a new and separate complaint with the Commission (Case No. 83-05-013), seeking access to PG&E's billing envelope for purposes of soliciting funds, increasing membership and informing PG&E

[8] TURN's petition for writ of review of the Commission's failure to adopt a specific remedy was denied by the California Supreme Court on August 13, 1982. *See* S.F. No. 24415. PG&E elected not to seek judicial review of Decision No. 93887 as modified.

ratepayers of energy-related issues affecting their bills. TURN's complaint presented three proposals, the first two of which involved the insertion in PG&E's billing envelope of "checkoff" lists of multiple consumer advocacy organizations and the third of which would grant TURN alone broader access to the billing envelope.

In Decision No. 83-12-047 (Dec. 20, 1983), as modified by Decision No. 84-05-039 (May 2, 1984), the decision below, the Commission granted TURN access to the extra space in PG&E's billing envelope four times per year for a period of two years,[9] rejecting the "checkoff" proposals because they contemplated the participation of multiple organizations and because TURN was the only organization which had applied for access to the billing envelope. App. A21-A22, A24, A35.[10]

The decision also provided that PG&E be permitted to use the extra space during the remaining eight months of the year as well as any remaining extra space not used by TURN during the months TURN's material is inserted; that PG&E and TURN each determine the content of its own material; that the costs of inserting material in the extra space be borne by the sponsor of the material; that PG&E bill TURN for all reasonable costs to the company occasioned by the addition of TURN's material; and that TURN's material clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or the Commission. App. A38-A39.

On October 4, 1984, the California Supreme Court filed its order summarily denying PG&E's petition for review. This appeal follows.

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[9] The Commission concluded that its previous final determination in Decision No. 93887 as to the ownership of the extra space was not properly subject to relitigation by PG&E in this case. App. A36.

[10] Because TURN was the only applicant for access to PG&E's billing space, the issue of how the competing interests of multiple applicant organizations should be resolved is not raised in this case. *See* App. A21-A22, A24, A35. The sole issue here is whether the Commission violated PG&E's First Amendment rights by granting access to TURN.

SUMMARY OF ARGUMENT

The Commission's decision granting TURN periodic access to the extra space in PG&E's billing envelope constitutes reasonable regulation of a public utility subject to the Commission's jurisdiction. The regulation reaches only that portion of the envelope which, under California law, is the property of the ratepayers. Indeed, even if the extra space were deemed utility property, the pervasive scheme of utility regulation in California would subject it to the Commission's regulatory control. The Commission has regulated the billing envelope as a conduit for disseminating service- and rate-related information to utility customers for more than 70 years.

The Commission's decision does not implicate, let alone abridge, the utility's First Amendment right to speak. The decision simply does not limit the utility's voice in the billing envelope. It merely raises the speculative possibility that PG&E may infrequently be required to pay the cost of delivering its message through the United States mail. Hence, the decision regulates economics, not expression, and in no way implicates First Amendment values.

Nevertheless, the decision satisfies First Amendment standards. It is plainly justifiable as a reasonable "time, place, and manner" regulation because it is content-neutral, is narrowly tailored to serve several significant governmental interests, and leaves open ample alternative channels for communication. *Clark v. Community for Creative Non-Violence*, ____ U.S. ____, 82 L.Ed.2d 221, 227, 104 S.Ct. 3065, 3069 (1984), and cases there cited. However, since the decision involves a nonpublic forum on property owned or controlled by the government, it is justifiable simply because it is content-neutral and reasonable. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 49 (1983); *U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1981).

Nor does the decision violate the utility's First Amendment rights to refrain from speaking or to refrain from associating with the views of another. These claims are foreclosed by *PruneYard v. Robins*, 447 U.S. 74, 85-88 (1980).

The Court may properly conclude, without the necessity of further briefing or oral argument, that PG&E's First Amendment claim is foreclosed by its prior decisions. The claim should therefore be deemed insubstantial and the appeal dismissed.

ARGUMENT

PG&E'S FIRST AMENDMENT CLAIM IS INSUBSTANTIAL

I

INTRODUCTION: THE COMMISSION'S DECISION REASONABLY REGULATES A PUBLIC UTILITY SUBJECT TO ITS JURISDICTION

A. The Regulation Reaches Only that Portion of the Billing Envelope Which, Under California Law, Is the Property of the Ratepayers

The Commission's determination that the prepaid extra space in PG&E's billing envelope is the property of the ratepayers is final under California law. That determination was made in Decision No. 93887, review of which was not sought by PG&E in the California Supreme Court or in this Court. Accordingly, under California law that determination is *res judicata*. Cal. Pub. Util. Code §1709; App. A59; *Sale v. Railroad Commission*, 15 Cal.2d 612, 616, 104 P.2d 38 (1940), and cases there cited; Witkin, California Procedure, Judgment §159 (2d ed. 1971). *See also People v. Western Air Lines*, 42 Cal.2d 621, 630, 268 P.2d 723, *appeal dismissed*, 348 U.S. 859, 860 (1954); *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366, 371-373 (1920); *Southern Pacific Transportation Co. v. Public Utilities Commission*, 716 F.2d 1285, 1289-1291 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 80 L.Ed.2d 457, 104 S.Ct. 1908 (1984); *Pacific Telephone & Telegraph Co. v. Public Utilities Commission*, 600 F.2d 1309, 1311-1312 (9th Cir.), *cert. denied*, 444 U.S. 920 (1979); *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 901, 160 Cal.Rptr. 124, 603 P.2d 41 (1979).

Indeed, the Commission explicitly accepted the *res judicata* argument raised below, concluding that "[t]his Commission's

findings on the issue of ownership of the extra space in PG&E's billing envelope in D.93887 as modified should not be relitigated in this proceeding" and "should be considered final for the purpose of this proceeding." App. A36. These determinations were ratified by the California Supreme Court's summary denial of review. *Consumers Lobby Against Monopolies*, *supra*, 25 Cal.3d at 901; *see Sutter Butte Canal Co. v. Railroad Commission*, 279 U.S. 125, 139 (1929). Accordingly, the Commission's determination of the ownership of the extra space is final for purposes of this appeal.[11]

B. Even if the Extra Space Were Deemed Utility Property, the Pervasive Scheme of Utility Regulation in California Would Subject It to the Commission's Regulatory Control

The California Supreme Court's summary denial of review also ratifies the Commission's determination that, irrespective of the ownership of the extra space, the Commission's state constitutional and statutory mandate to regulate public utilities, their practices, and their property extends to the order here. App. A6-A8, A32-A33, A37. *Sutter Butte Canal Co.*, *supra*, 279 U.S. at 139.

The rationale underlying the state's extremely broad power to regulate public utilities has often been restated. As noted in Justice Blackmun's dissent in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 549-550 (1980), a public

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[11] The *res judicata* determination constitutes an adequate and independent non-federal ground for the decision below because the First Amendment confers no right on the utility to speak, or to limit the speech of third parties, on the property of another. *Durley v. Mayo*, 351 U.S. 277, 281 (1956); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). It has long been established that a state *res judicata* determination presents no substantial federal question. *San Francisco v. Itsell*, 133 U.S. 65, 67 (1890); *see Southern Pac. Transp. Co. v. Public Utilities Commission*, ____ U.S. ____, 80 L.Ed.2d 452, 104 S.Ct. 1901 (1984) *(mem.), dismissing appeal from California Supreme Court's summary denial of review of Commission decision based on* res judicata. Notably, PG&E appears to have acquiesced in this final determination of state property law; the utility has now abandoned its Fifth Amendment "taking" argument raised below.

utility is a state-created monopoly, permitted to operate as such solely because of a determination by the state that the public interest is better served by protecting the utility from competition. "This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching." *Id.* at 550.

The California Public Utilities Commission was established for this purpose. "Created by the Constitution in 1911, the commission was designed to protect the people of the state from the consequences of destructive monopoly in the public service industries." *Sale v. Railroad Commission, supra,* 15 Cal.2d at 617.

Under its broad state constitutional and statutory mandate, the Commission may do all things "necessary and convenient" to the exercise of its regulatory power, including the regulation of a utility's rates, services, rules, practices, appliances, equipment, facilities, methods of distribution, methods of transmission and physical property. Cal. Pub. Util. Code §§ 701, 728, 729, 761 and 762; App. A57-A59; *see, e.g., Munn v. Illinois,* 94 U.S. 113, 125-130 (1877); *New Orleans v. Dukes,* 427 U.S. 297, 303-306 (1976); *Nebbia v. New York,* 291 U.S. 502, 523-525, 537 (1934); *Sutter Butte Canal Co., supra,* 279 U.S. at 135-138; *General Telephone Co. v. Public Utilities Commission,* 34 Cal.3d 817, 822-827, 195 Cal.Rptr. 695, 670 P.2d 349 (1983). As found by the Commission and the California Supreme Court, this mandate extends to the Commission's order here.

C. The Commission Has Historically Regulated the Billing Envelope as a Conduit for Disseminating Service- and Rate-related Information to Utility Customers

A brief history of the Commission's regulation of the billing process is helpful in placing PG&E's First Amendment claim in its proper context. At the outset, however, it is important to understand that the billing process is integral to utility service and is inextricably entwined with rates. When a customer signs up for service such as that provided by PG&E, he or she is entitled not only to gas and electric power but also to a monthly

bill which informs him or her with sufficient specificity of the amount of power used, the rate charged and the amount due. A utility's failure properly and timely to bill its customers may *inter alia* discourage timely payment, deprive the customers of sufficient information to assess the accuracy of the bill, encourage billing disputes, increase the utility's costs of collection, increase uncollectibles or bad debt, heighten the frequency of customers having their service erroneously discontinued for nonpayment and substantially inconvenience both the utility and its customers. Such failure constitutes "poor management [which] result[s] in injury to those who do pay their bills." *Tujunga Water and Power Co.,* 7 Cal.R.R.C. 580, 589 (1915). In addition, such failure will likely necessitate an increase in rates.

One inevitable function of the billing process is the provision of information to the customer. Indeed, the bill itself—which is essentially a demand for payment for services rendered—provides the utility customer with a wide variety of information, such as the amount of service used (as itemized in accordance with Commission regulations), the rate charged (as fixed by the Commission) and the date on which the amount of money claimed falls due (as stated in tariff rules subject to Commission approval). It may also provide information as to procedures for disputing the accuracy of the bill, information as to procedures for making payment (*e.g.,* a return envelope may be enclosed in the billing envelope), notices of Commission proceedings, notices of rate, billing or other service changes, notices of the availability of special programs regulated by the Commission and a wide variety of additional messages, some of which may be printed on the face of the bill and some of which may be communicated on a separate insert placed in the billing envelope pursuant to an order of the Commission.

Apart from its use to facilitate the orderly satisfaction of contractual obligations between the utility and its customers, the utility billing envelope provides a "unique forum[] for expression." *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 500 (1981). The envelope provides the means of communicating directly with the class of persons who are the utility's customers and no other. Moreover, the contents of the billing envelope

demand the recipient's close attention because they are part of, and may well affect, the ongoing business relationship between the utility and its customer.

The Commission has asserted its jurisdiction over the billing envelope as a channel of communication almost from the Commission's inception. In *Slinack v. Inglewood Water Co.*, 3 Cal.R.R.C. 752, 757 (1913), the Commission (then known as the California Railroad Commission) ordered a water company "to adopt some method of informing its patrons or consumers of water in writing of the amount of water used each month, and of the rate and amount to be paid."[12]

Similarly, in *Pacific Gas & Electric Co.*, 17 Cal.R.R.C. 143, 144, 147 (1919), the Commission approved a set of tariffs or rules and regulations, subject to such "changes and amendments as may [thereafter] appear advisable [to the Commission], requiring that "[e]ach bill for electric service will contain on its face" certain specified language.[13] Thus, as early as 1919, the Commission required PG&E to communicate specific information to its customers by what was effectively a bill insert.[14]

Indeed, from the moment the Commission began to regulate rates for utilities, a utility's bill was obliged to communicate to

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[12] The Commission similarly ruled in *Peters-Rhoades Co.*, 27 Cal.R.R.C. 297, 299 (1925), "[w]here the rates and rules of a water utility are based upon monthly payments for service, it is the duty of such a utility to render each consumer a monthly bill."

[13] The Commission commonly sets the precise terms of a tariff and orders the utility to file it. Such tariffs have the force of law. *Dyke Water Co. v. Public Utilities Commission*, 56 Cal.2d 105, 123, 14 Cal. Rptr. 310, 363 P.2d 326, *cert. denied*, 368 U.S. 939 (1961).

[14] The requirement was stated as follows, 17 Cal.R.R.C. at 147:

> "(b) *Bills*
>
> "(1) Each bill for electric service will contain on the face the following notation: 'See other side for rules regarding payment of bills, disputed bills and discontinuance of service.'
>
> "(2) Each bill for electric service will contain on the back thereof a copy of Rule and Regulation No. 6(b), No. 9(a) and No. 11."

its customers the rates *set by the Commission*. Cal. Const. art. XII, § 6; Cal. Pub. Util. Code §§ 728 and 729; App. at A57-A58.

In *Campbell Telephone Co.*, 27 Cal.R.R.C. 251 (1925), the Commission addressed the problem of the inconvenience to telephone subscribers of receiving two separate telephone bills, one for local exchange service from the Campbell Telephone Co. and one for toll service from the Pacific Telephone and Telegraph Co. The Commission concluded that "a more satisfactory relation would result both to the subscribers and applicant [the local exchange carrier] if the latter would handle the billing for toll service to its subscribers." *Id.* at 252. Thus in 1925 the Commission effectively ruled that the local company communicate through its billing process the "message," or demand for payment, of another company.[15]

And, in *Packard v. Pacific Telephone & Telegraph Co.*, 71 Cal.P.U.C. 469, 480 (1970), and *Welch v. Pacific Telephone & Telegraph Co.*, 72 Cal.P.U.C. 74, 75 (1971), the Commission required a utility to include on its bill for services a utility user's tax, the speech of the taxing municipality.

On numerous recent occasions, the Commission has regulated the billing process to ensure that appropriate rate- and service-related information reaches the customer. Such regulation has ranged from merely altering the format of the bill[16] to specifying the wording of bill inserts concerning a wide variety of subjects.[17]

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[15] The same principle applies today. Pacific Bell, the western regional Bell Operating Company, includes with its own bill the bill of AT&T Communications and/or other long distance carriers.

[16] For example, the Commission has required changes in the format of a utility bill where it concluded that the customer was entitled to fuller itemization of charges, where additional information appeared necessary to assist telephone subscribers in ascertaining whether to rent or purchase their telephones, and where a change was necessary to ensure that customers protesting a utility user's tax would not have service disconnected while pursuing such protests in the courts.

[17] Recent bill inserts ordered by the Commission have notified telephone subscribers of a lifeline program to ensure universal service in the wake of the AT&T divestiture, have indicated that elderly and

Thus the Commission has long exercised regulatory authority over the billing envelope, including the practice of enclosing bill inserts in that envelope.[18]

It is against this background that the substantiality of PG&E's First Amendment claim must be measured.

II

THE COMMISSION HAS NOT ABRIDGED PG&E's RIGHT TO SPEAK

A. The Commission's Decision Imposes No Cognizable Restriction on PG&E's Ability to Speak in the Billing Envelope; Hence No First Amendment Values Are Implicated

Consolidated Edison Co. v. Public Service Commission, supra, 447 U.S. 530, on which PG&E relies, is a very different case from this one. There, unlike here, the New York Public Service Commission had banned outright the utility's use of bill inserts which expressed opinions on controversial issues of public policy. *Id.* at 533. And there, unlike here, the restriction on the utility's speech was impermissibly content-based. *Id.* at 537. Thus the Court concluded that the state's broad prohibition of

handicapped customers may designate third parties to receive notices on their behalf to forestall the improper discontinuance of service, have announced the availability of communications devices for the deaf, have detailed in foreign languages emergency telephone numbers and dialing information, have announced the availability of water conservation devices, have provided information concerning a variety of Commission-approved weatherization and energy conservation programs, have explained the effects of certain legislation on utility rates and have explained the components of utility costs, services and rate increases.

[18] Notably, the use of bill inserts to communicate with utility ratepayers has become so commonplace that even U.S. District Judge Harold H. Greene has exercised the court's equitable powers in the AT&T divestiture case to require the inclusion of an informational bill insert. *See United States v. Western Electric Co.*, 578 F.Supp. 668, 676 (D.D.C. 1983).

The Congress of the United States has used its legislative power to that same end. *See* 16 U.S.C. § 2625(f)(2).

constitutionally protected speech was "neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest." *Id.* at 544.

Here, on the other hand, the Commission has not banned or restricted the utility's speech in any meaningful way. In granting TURN limited access to the extra space, the Commission's decision specifically states that "PG&E shall be permitted to use the extra space during the remaining eight months and may also make use of any extra space not used by TURN during the months TURN's material is inserted." App. A38. Nothing in the decision prohibits PG&E from disseminating *Progress* in the billing envelope, even in the months in which access is granted to TURN, so long as it pays the additional postage costs, if any; and if envelope space is lacking, PG&E is free to expand the size of its envelope.

At the heart of PG&E's claim is its assertion that, under *Consolidated Edison,* the First Amendment confers on the utility *alone* the right to speak in the extra space of the billing envelope. But the availability of postage-prepaid space in the billing envelope is dependent on the size and weight of the envelope and the other materials enclosed in it. These factors are variable. The extra space might cease to exist entirely if legitimate billing requirements, such as the degree of itemization required on the bill or the number of bill inserts otherwise required, were modified, or if postal regulations were altered to permit incremental postage for measured fractions of an ounce. To attain its legitimate objectives, the Commission may permissibly impose such billing or other informational requirements as are consistent with its regulatory mission, even if those requirements would theoretically eliminate entirely the prepaid extra space in the envelope. *See, e.g.,* note 17, *supra.* PG&E's claim that the First Amendment renders the extra space in its billing envelope immune from reasonable regulation is simply inconsistent with its position as a regulated public utility. *See, e.g., Munn*

v. Illinois, supra, 94 U.S. at 125-130; *Sutter Butte Canal Co., supra,* 279 U.S. at 137-138.[19]

Moreover, the Commission's order here accommodates PG&E's desire to continue to disseminate *Progress* in the billing envelope and creates only a minimally intrusive, narrowly drawn limitation on the utility's prior practice. The order grants PG&E unfettered ability to disseminate *Progress* to its customers in the billing envelope each and every month of the year, limited only by the speculative possibility that it may by required to pay the cost of postage for *Progress* if TURN's use of the prepaid billing space necessitates additional postage costs for the delivery of *Progress.* Hence, the Commission's decision will at most deprive the utility, on infrequent occasions, of a "free ride"—the delivery of its viewpoint at the expense and under the involuntary subsidy of those with whom it seeks to communicate. The denial of a free ride is not a denial of free speech. *U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. at 127; *see also Abood v. Detroit Board of Education,* 431 U.S. 209, 233-236 (1977); *Consolidated Edison, supra,* 447 U.S. at 551-555 (Blackmun, J., dissenting); *Regan v. Taxation With Representation,* 461 U.S. 540, 545-546 (1983).

If anything, *Consolidated Edison* foreordained the Commission's decision here. The majority opinion noted that "the [New York] Commission has not shown on the record before us that the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope. Unlike radio or television stations broadcasting on a single frequency, multiple

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[19] As was argued to the California Supreme Court, regulation of the extra space is mandated *inter alia* by the Commission's authority to regulate rates. Cal. Pub. Util. Code §§ 728 and 729; App. A57-A58. Since the extra space has economic value measured by its ability to generate income and since the generation of such income would reduce rates, PG&E's appropriation of the extra space for its own use is equivalent to raising rates without required Commission authorization. Under its authority to regulate rates, the Commission is entitled to regulate the use of a potentially income-generating asset for the ratepayers' benefit.

bill inserts will not result in a 'cacophony of competing voices.' " 447 U.S. at 543, *quoting Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 376 (1969).

B. The Commission's Decision Withstands "Time, Place, and Manner" Analysis

In addition, the analysis in *Consolidated Edison* leaves little doubt that the Commission's decision constitutes a "reasonable time, place, and manner" regulation which is content-neutral, serves a significant governmental interest, and leaves open ample alternative channels for communication. *Consolidated Edison, supra,* 447 U.S. at 535.

First, the Commission decision does not restrict PG&E's speech based on content. The decision states: "Currently, no controls are placed on the content of *Progress* and we will not undertake to control the material inserted by TURN." App. A22. And it further orders that "PG&E . . . shall . . . determine the content of its own material." App. A38. Thus the decision places no limitation on PG&E's ability to address any subject matter or to express any viewpoint. *Consolidated Edison, supra,* 447 U.S. at 536. And, unlike in *Consolidated Edison,* the Commission has not in any significant way "limited the means by which [the utility] may participate in the public debate on . . . controversial issues of national interest and importance." *Id.* at 535. The Commission's regulation is plainly content-neutral.

Second, the Commission's granting consumer groups access to the extra space in the billing envelope is narrowly tailored to serve several significant governmental interests. It promotes full and effective consumer participation in CPUC proceedings. App. A27, A35, A36. It enhances the accuracy of the fact-finding process by "tend[ing] to enhance the record in [such] proceedings." App. A36. It provides information about consumer organizations to those ratepayers desiring such information and furthers the fuller understanding of energy- and regulatory-related issues by consumers. App. A20-A21, A27, A36. It advances the ratepayers' state and federal constitutional rights to receive ideas and information, based on the assumption "that the ratepayers will benefit more from exposure to a variety of views

than they will from only [those] of PG&E." App. A22. It provides added protection for the particular interests of residential ratepayers and other specific ratepayer groups beyond that provided by the Commission's staff (which is charged with representing *all* ratepayers). App. A20. It limits the ratepayers' compelled subsidy of utility speech in violation of PURPA. App. A3-A4. *See Abood v. Detroit Board of Education, supra,* 431 U.S. at 235; *Consolidated Edison, supra,* 447 U.S. at 544 (Marshall, J., concurring) and 551 (Blackmun, J., dissenting). It halts PG&E's misappropriation of an asset which belongs to the ratepayers and the utility's consequent unjust enrichment. App. A4. And it promotes fair and efficient rates, the overall objective of the regulatory scheme. All of these are legitimate and significant governmental interests. *See Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 561-562, 568-569 (1980); *Consumers Lobby Against Monopolies v. Public Utilities Commission, supra,* 25 Cal.3d at 911.

Third, the Commission's decision leaves PG&E with unlimited "alternative channels of communication." 447 U.S. at 535. Every day of the year, if it so desires, PG&E may send as many copies as it pleases of *Progress* or any other publication to its customers, so long as it pays the requisite postage and other costs. Indeed, on the very day that TURN's insert is enclosed in the billing envelope, PG&E may send unlimited materials in rebuttal either in the envelope itself or under separate cover. The decision specifically provides that PG&E "may also make use of any extra space not used by TURN during the months TURN's material is inserted." App. A38. And nowhere does the decision preclude PG&E's placing such additional materials in the billing envelope as would necessitate postage costs for more than one ounce of weight, so long as PG&E bears those extra costs.

In sum, PG&E, as sole owner of its customer list, has an unlimited direct mail forum to its customers so long as it underwrites the cost of delivery. This constitutes "ample alternative channels for communication." 447 U.S. at 535.

However, consumer organizations such as TURN have no comparable channel of communication. While they may advertise in the media in ways generally available to the public, they

do not have PG&E's customer list and hence have no way of reaching *precisely* that audience of 4.2 million ratepaying bill recipients.[20] Nor do such organizations have a way of reaching that "captive" audience in a manner which demands its special attention to their message.

Moreover, as was argued to the California Supreme Court below, the ratepayers' well-recognized First Amendment and state constitutional (Cal. Const. art. I, §§ 2 and 3) rights to receive information and ideas[21] must be factored into the equation in determining whether the Commission's granting TURN access to the billing envelope violates PG&E's First Amendment rights. Leaving PG&E with exclusive access to the limited and unique forum provided by the billing envelope unquestionably burdens the ratepayers' rights to receive information and ideas

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[20] It is doubtful whether PG&E can properly disclose, or be ordered to disclose, to consumer groups the names and addresses of its customers. Cal. Const. art. I, § 1, explicitly guarantees the right of privacy to all California citizens, and only recently, in *People v. Chapman,* 36 Cal.3d 98, 113, 201 Cal.Rptr. 628, 679 P.2d 62 (1984), the California Supreme Court held that a utility customer had a reasonable expectation of privacy in unlisted information concerning his name and address, and that the warrantless disclosure of this information violated the search and seizure provisions of Cal. Const. art. I, § 13. Accordingly, the Commission's decision here appears to be the only reasonable way of providing consumer groups with access to the direct mail forum while accommodating the state constitutional privacy rights of the ratepayers. The state, of course, has a significant, if not compelling, interest, *see Widmar v. Vincent,* 454 U.S. 263, 275-276 and n. 17 (1981), in complying with its own constitution.

[21] *E.g., Lamont v. Postmaster General,* 381 U.S. 301 (1965), at 301 (opin. of the Ct.) and 308 (Brennan, J., concurring); *Board of Education v. Pico,* 457 U.S. 853, 867-868 (1982) (opin. of Brennan, J.); *CBS v. FCC,* 453 U.S. 367, 395-396 (1981); *Houchins v. KQED,* 438 U.S. 1, 30 (1978) (Stevens, J., dissenting); *Saxbe v. Washington Post,* 417 U.S. 843, 862-863 (1974) (Powell, J., dissenting); *Procunier v. Martinez,* 416 U.S. 396, 408-409 (1974); *Kleindienst v. Mandel,* 408 U.S. 753, 762-763 (1972); *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 390; *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); *Martin v. Struthers,* 319 U.S. 141, 143 (1943).

from the competing viewpoints of the very organizations representing a substantial number of those ratepayers in Commission proceedings. On the other hand, granting reasonable access to speakers such as TURN accommodates the First Amendment and state constitutional rights both of PG&E and the ratepayers while taking into account the limited scope of the billing envelope forum and the purpose it serves.[22]

By granting TURN access to the extra space in the billing envelope four times a year, the Commission has plainly adopted a reasonable time, place, and manner regulation narrowly tailored to serve a significant governmental interest and leaving PG&E ample alternative channels for communication. *E.g., Perry Education Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at 45; *U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. at 132; *Consolidated Edison, supra,* 447 U.S. at 535-536.

C. The Commission's Decision Constitutes Permissible Regulation of a Nonpublic Forum

However, the traditional "time, place, and manner" test, though plainly satisfied by the Commission's decision, may actually be more stringent than the test applicable here because the extra space in the billing envelope is not, nor has the Commission ever treated it as, an unlimited "public forum." The extra space is a nonpublic forum over which the Commission, by its broad regulatory powers, has "the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry, supra,* 460 U.S. at 49. "These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.* (footnote omitted). Thus in *Perry* this Court upheld a school policy permitting access to teachers' mailboxes for a union elected by teachers as their exclusive bargaining representative

[22] The state's interest in accommodating the First Amendment and state constitutional rights of its citizens is "compelling." *Widmar v. Vincent, supra,* 454 U.S. at 271, 275-276 and n. 17.

but denying access to a rival union because the policy distinguished between the two unions based on their status rather than their views. *Id.* at 53.[23]

Of course *Perry* involved property owned by the government which was a nonpublic forum. If the extra space is instead deemed private property subject to broad governmental supervision and control, the most apt analogy may be provided by *U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. 114. There a federal statute provided that a citizen's privately-owned mail receptacle regulated by the U.S. Postal Service not be used for the delivery of mailable matter on which postage had not been paid. This Court, noting that no person is required to provide a mailbox, observed that "[w]hat the legislation and regulations do require is that those persons who *do* wish to receive and deposit their mail at their home or business do so under the direction and control of the Postal Service." *Id.* at 126 (emphasis in original). Eschewing the "time, place, and manner" analysis applied to traditional "public forums", *id.* at 132, the Court concluded that the governmentally-imposed postage requirement for the use of privately-owned mailboxes was permissible simply because it was "both reasonable and content-neutral." *Id.* at 131 n. 7 and 133.[24]

[23] Neither the majority opinion in *Perry* nor Justice Brennan's dissent, in which three other Justices joined, mandates a different result here. The Commission's decision involves no viewpoint discrimination and in this case no party requesting access has been excluded. 460 U.S. at 64 (Brennan, J., dissenting). Moreover, Justice Brennan acknowledges that distinctions in access based on "speaker identity" may be permissible where access is restricted to those involved in the "official business" of the particular governmental agency. 460 U.S. at 61 n. 5, 64 n. 8. Any restriction in speaker access perceived in the Commission's decision would plainly satisfy that standard.

[24] "Public property which is not by tradition or designation a forum for public communication may be reserved by the state 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.' " *City Council v.*

Similarly here, when a corporation enters into the business of providing gas and electric service to the California public as a regulated monopoly and receives the state's assurance of an opportunity to earn a reasonable rate of return, its practices and property become subject to the Commission's jurisdiction. Cal. Pub. Util. Code §§ 701, 728, 729, 761 and 762; App. A57-A59. *See Munn v. Illinois, supra,* 94 U.S. at 126-130; *Nebbia v. New York, supra,* 291 U.S. at 532-539; *Sutter Butte Canal Co., supra,* 279 U.S. at 138. Under *Greenburgh,* the Commission's reasonable and content-neutral regulation of the extra space in the billing envelope withstands First Amendment scrutiny.

In sum, the Commission's decision in no way abridges PG&E's right to speak in the billing envelope. The sole limitation on PG&E's speech is the speculative possibility that the utility may on infrequent occasions be required to bear the cost of delivering its message through the United States mail. This possibility does not implicate First Amendment values. Accordingly, PG&E has failed in its "obligation . . . to demonstrate that the First Amendment even applies." *See Community for Creative Non-Violence, supra,* ____ U.S. at ____ n. 5, 82 L.Ed.2d at 227 n. 5, 104 S.Ct. at 3069 n. 5.

Nevertheless, the decision satisfies First Amendment standards. Although it plainly withstands traditional "time, place, and manner" scrutiny, this is not a "public forum" case. Instead, it is a case involving a nonpublic forum on property "owned or controlled by the government." *Greenburgh, supra,* 453 U.S. at 132. Accordingly, under *Perry* and *Greenburgh,* the decision is justified because any restriction it imposes on PG&E's speech is content-neutral and reasonable. PG&E's claim must therefore be deemed insubstantial.

Taxpayers for Vincent, ____ U.S. ____, 80 L.Ed.2d 772, 793, 104 S.Ct. 2118, 2134 (1984), *quoting Perry, supra,* 460 U.S. at 46.

III

THE COMMISSION HAS NOT ABRIDGED PG&E's RIGHTS TO REFRAIN FROM SPEAKING OR TO REFRAIN FROM ASSOCIATING WITH THE VIEWS OF ANOTHER

The claimed violations of PG&E's First Amendment rights to refrain from speaking and to refrain from associating with the views of another are similarly insubstantial and should be summarily rejected based on the analysis in *PruneYard v. Robins, supra,* 447 U.S. at 85-88.

In *PruneYard* the private owner of a shopping center sought to exclude persons distributing pamphlets from his property, contending that he had "a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." 447 U.S. at 85 (footnote omitted). This Court rejected the claim, concluding that a state may exercise its police power to adopt reasonable restrictions on private property without violating the First Amendment so long as the views of those distributing pamphlets were not likely to be identified with the views of the owner, the state had dictated no particular message to be distributed, and the owner was free to disassociate himself from the views of the speakers. *Id.* at 85-88. These established principles are applicable here and warrant summary dismissal of PG&E's appeal.[25]

The cases on which PG&E relies, *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *Wooley v. Maynard,* 430 U.S. 705 (1977); and *Abood v. Detroit Board of Education, supra,* 431 U.S. 209, are inapposite. Unlike *Tornillo,* the Commission's decision involves no "intrusion into the function of the editors" of *Progress.* 418 U.S. at 258. And rather than "dampen[ing] the vigor and limit[ing] the variety of public debate," *id.* at 257, the Commission's decision here can only encourage it.

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[25] Indeed, here the forum to which TURN has been granted access is situated on ratepayer property, not that of PG&E. *A fortiori,* the utility's claim must be rejected under *PruneYard.*

Moreover, unlike *Maynard*, the decision here leaves PG&E free to "expressly disavow any connection with [TURN's] message," *PruneYard, supra*, 447 U.S. at 87, by placing disclaimers either on its bill, in an additional insert, in *Progress*, in a separate mailing or anywhere else it chooses. And since the decision itself requires that "[a]ll of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E," App. A39, it is clear that TURN's views "will not likely be identified with those of [PG&E]," 447 U.S. at 87.

Nor is PG&E being required "to contribute to the support of an ideological cause [it] may oppose" in violation of the principle of *Abood, supra*, 431 U.S. at 235. The Commission's decision provides that "[c]osts of inserting materials in the extra space shall be borne by the sponsor of the materials [and] PG&E shall bill TURN for all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials." App. A38-A39. Moreover, the postage costs attributable to the extra space are paid by the ratepayers, not PG&E.[26]

The Commission's decision does not violate PG&E's First Amendment rights.

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[26] If anything, it is PG&E that is violating the rights of the ratepayers to refrain from disseminating and associating with the utility's views by appropriating the ratepayers' involuntary subsidy of its speech. *See Consolidated Edison, supra*, 447 U.S. at 544 (Marshall, J., concurring) and 551 (Blackmun, J., dissenting).

CONCLUSION

For the reasons stated, the Court should dismiss the appeal for want of a substantial federal question.

Respectfully submitted,

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The Public Utilities
Commission of the
State of California

March 1, 1985

(Appendices follow)

Appendix A

[Conformed copy of Decision No. 83-12-047 (Filed December 20, 1983), as modified by Decision No. 84-05-039 (Filed May 2, 1984)] *

DECISION 83-12-047 DECEMBER 20, 1983
BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, *Complainant,* vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, *Defendant.*	Case 83-05-13 (Filed May 31, 1983)

ROBERT SPERTUS, MICHAEL PETER FLORIO, and JOHN F. ELLIOTT, *Attorneys at Law* and SYLVIA M. SIEGEL, *for complainant.*

PETER W. HANSCHEN, ROBERT HARRIS, and SHIRLEY WOO, *Attorneys at Law, for defendant.*

WILLIAM L. KNECHT, *Attorney at Law, for California Association of Utility Shareholders;* and ETHAN SCHULMAN and HARVEY ROSENFELD, *Attorneys at Law, for Center for Law in the Public Interest, intervenors.*

DIANE I. FELLMAN, *Attorney at Law, for the Commission staff.*

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* [Although the Appendix to the Jurisdictional Statement contains both Decision No. 83-12-047 (J.S. App., at A1-A34) and the modifying passages of Decision No. 84-05-039 (J.S. App., at A45-A54), the presentation of the two majority opinions in a single opinion *as modified* greatly facilitates reading the Commission's decision. For the convenience of the Court, the Commission hereby submits a single conformed copy of its majority opinion in Decision No. 83-12-047, as modified by Decision No. 84-05-039. The concurring and dissenting opinions follow the conformed majority opinion.]

OPINION

Summary

By this decision the Commission grants, in modified form, the complaint of Toward Utility Rate Normalization (TURN) proposing access to the extra space in Pacific Gas and Electric Company's (PG&E) billing envelope by consumer representative organizations for the purpose of soliciting funds to be used for residential ratepayer representation in proceedings of this Commission involving PG&E.

The decision addresses the effect of prior Commission determinations on the ownership of the billing envelope extra space; procedural issues raised by the parties; jurisdictional attacks on the Commission's authority to grant the relief requested, including constitutional issues; and the merits of the proposal.

Introduction

The parties and subject matter of this case are not new to us. The issue was first raised by TURN as an intervenor in the proceedings of the rate application filed by PG&E in late 1980 (Application 60153). In those proceedings TURN argued, among other things, that this Commission should find PG&E's inclusion of its publication, *Progress*, in the customers' billing envelopes to be improper because it violated the advertising standards of the Public Utility Regulatory Procedures Act of 1978 (PURPA), 16 U.S.C. Section 2601, et seq., by which PG&E was bound.[1] At the time TURN's primary concern was not how the billing envelope space should be used but preventing PG&E from using it in a way TURN believed to be illegal.

In developing its argument on this point TURN suggested certain possible legal bases for this Commission's controlling

[1] The relevant PURPA sections prohibit a utility from recovering from its ratepayers any direct or indirect expenditure for political advertising.

such envelope use. One was for the commission to restrict PG&E's use based on a finding that the envelope was ratepayer property—an idea first propounded by Justice Blackmun in his dissent in *Consolidated Edison Co. v. Public Service Commission* (1979) 447 US 530, 534, N.1. (*Con Ed*).

In our decision on the application, Decision (D.) 93887 issued December 30, 1981 (as modified by D.82-03-047 issued March 2, 1982), we concluded that, as TURN asserted, we had adopted the PURPA political advertising standards, that PG&E was bound by them, and that PG&E had engaged in political advertising in the *Progress* from time to time in violation of the PURPA prohibitions. We did not adopt the idea that the envelope itself is ratepayer property, as TURN suggested. However, we did find that the "extra space" in the billing envelope is ratepayer property. (D.93887 as modified, Finding of Fact 58, p.220.) We defined extra space as the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost.

Our conclusion concerning the ownership of the extra space resulted from our analysis of the unique factors which allow this issue to exist. It was clear then as it is now that envelope and postage costs and any other costs of mailing bills are a necessary part of providing utility service to the customer, so the costs are a legitimate revenue requirement which we should, and do, permit PG&E to include in the rates it collects from ratepayers. However, due to the nature of postal rates (which are assessed in increments of one ounce) extra space exists in these billing envelopes. If we regarded that extra space as the property of PG&E, then the result would be that along with PG&E's legitimate cost of mailing it would also be entitled to profit from

the economic value of that extra space.[2] Such a result is inequitable because it provides PG&E with a benefit beyond the mailing expense legitimately recoverable from the ratepayers. Mindful that the extra space is an artifact generated with ratepayer funds, and is not an intended or necessary item of rate base, and that the only alternative treatment would unjustly enrich PG&E and simultaneously deprive the ratepayers of the value of that space, we concluded that the extra space in the billing envelope "is properly considered as ratepayer property." (D.93887, Finding of Fact 58, p.220.)

We reiterated our view that such a conclusion was mandated by the equities of the situation when, in our decision in *Center for Public Interest Law and Robert L. Simmons v. San Diego Gas & Electric Company*, D.83-04-020 decided April 6, 1983,[3] we stated:

> "We have stated that the extra space belongs to the ratepayers. In so doing, we are not so much describing a traditional property right as an equity right. . . . we are saying that the *reason* the ratepayers pay for the billing envelopes and postage is that those costs are an expense necessary to the operation of the utility. So, what the ratepayers are legitimately paying for is the conveyance of their bills and occasional legally mandated notices. Since these documents

[2] As we stated in D.93887, there is no question that this space has value. Quantification of that value, though, is necessarily subjective and imprecise since it is dependent on a number of variables such as the nature of the insert, the identity of the beneficiary or beneficiaries of the communication and some alternative means of conveying the same information to the same people. It may also include such intangibles as the aura of goodwill created around the proponent of the message or some other party, and the increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately.

[3] This case is also known as the "UCAN" case because it proposed establishment of the Utility Consumers Action Network or UCAN.

> together do not generally add up to one ounce . . . the ratepayer has paid for some empty space . . . " (P.14.)

In the present matter TURN has filed a complaint against PG&E for not permitting access to the extra space in its billing envelopes by intervenors for the purpose of soliciting voluntary donations to be used to represent residential ratepayers in Commission proceedings involving PG&E. This complaint is a response to the invitation we made in D.93887:

> ". . . We invite TURN or any other interested party to file a complaint with this Commission with a proposed solution to this 'extra' space problem. The complaint would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the 'extra space' more efficiently for the ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such complaint." (P.159(g) as modified.)

TURN's complaint lists three alternative "Consumer Advocacy Checkoff" proposals. Each alternative proposal calls for a billing envelope extra space insert, as a two-year experiment, which (1) explains the program, (2) sets forth a list of pending and anticipated PG&E applications and other cases likely to have a significant effect on customers' rates and services, and (3) invites voluntary donations to support advocacy by consumer organizations (identified on a check-off list by name, address, and date of incorporation) on behalf of PG&E's residential customers before the Commission. The insert would also include a return envelope for mailing donations to a central collection point for transmittal to the organization or organizations checked off on the list.

The alternatives differ from one another in the following specifics:

a. Proposal 1 would require the Commission or its designated representative, such as the Public Advisor, to

produce and write the insert. Donations would be sent to the care of the Public Advisor organizations.

b. Proposal 2 is the same as Proposal 1 except that the functions assigned to the Commission or its designated representative would be performed by or under the supervision of a "blue ribbon" panel appointed by the Commission with the assistance of its Public Advisor.

c. Proposal 3 would allow only TURN to solicit donations by way of an insert, similar in format to the others, but prepared by TURN.

A prehearing conference was held on this matter before Administrative Law Judge (ALJ) Baer on August 9, 1983 in the Commission's Courtroom in San Francisco. A hearing was held in the same place before ALJ Colgan on September 12 through 15, 1983. The right to intervene was requested by two parties: the California Association of Utility Shareholders (CAUS) and the California Public Interest Research Group (Cal PIRG). Both were granted. Only CAUS actually participated in the hearing or filed briefs. The Commission Staff through the Legal Division participated by cross-examining witnesses and filing briefs.

The matter was submitted on September 15, pending receipt of one late-filed exhibit on September 21, 1983, simultaneous closing briefs due September 28, 1983 and simultaneous reply briefs due October 4, 1983.

While our previous decisions on this subject have concluded that the extra space is the property of ratepayers, we should point out that our jurisdiction over the extra space does not depend solely or entirely on a determination of the ownership of the extra space or the exact nature of a property right in such space.

The extra space in the billing envelope is a byproduct of an activity essential to the operation of the regulated utility—billing. Since billing is an essential and proper function of a regulated utility, this Commission has allowed the utility to

recover its reasonable expenses—postage, materials, labor, overhead—from ratepayers. The existence of the extra space is a direct consequence of the act of billing for utility services and the way in which postal costs are assessed.

Because the billing space is so inextricably related to activities subject to routine regulation, we have repeatedly exercised our authority under the State Constitution and Public Utilities Code Section 701 to permit and require the space to be used for the benefit of ratepayers. The billing space has frequently been put to the obvious use of communicating with ratepayers. Recently, we have also solicited proposals that would allow ratepayers to benefit from the economic value of the extra space. (D.93887)

Use of the billing space to accomplish various informative functions for the benefit of ratepayers now occurs so frequently that it had become a routine matter. Notices of applications for rate increases and notices of public hearings are regularly inserted without objection in billing envelopes (see, Resolution ALJ-149, October 20, 1982, p. 3.)—so routinely, in fact, that we have referred to extra space as being that space which is available *after* legal notices and, of course, the bills and return envelopes have been included. These notices have been included in billings precisely because the billing envelope is such an effective method of communicating with ratepayers. We have also required utilities to include notices of the availability of various conservation programs (D.92653) and conservation information (D.89316). We have required our utilities to include an insert informing ratepayers of the effects of a complicated federal tax law (D.93887). And most recently, we have used the billing space of telephone utilities to notify customers of a new lifeline program designed to assist low-income people to remain on the telephone system in the wake of the divestiture of AT&T.(D.84-04-053.) All of these are examples of the proper use of a valuable means of communication that the extra space provides.

We have also permitted the utilities to use this extra space to communicate with ratepayers. Subject to our general oversight (e.g. P.U. Code Section 453 (c), (d)), utilities have used this space to inform customers of ways to reduce energy consumption, of the availability of special programs, of how to resolve problems with the utility's service, and of other topics. When a utility has used the extra space to engage in political advertising, we expressed our concern that ratepayers should not be required to bear any portion of the direct or indirect expense connected with such advertising. (D.93887.)

Other uses of the extra space are certainly possible. TURN has presented evidence in an earlier case that a utility in another state has sold the extra space for commercial advertising unrelated the utility's business and used the resulting revenues to reduce rates to customers.

Viewed in this general context, it appears to us that the issue raised by TURN's complaint is *not* whether the Commission may exert its authority over the billing space. As the previously stated examples demonstrate, the Commission has repeatedly, and we think properly, required the billing space to be used for the benefit of ratepayers. As we mentioned previously, this power has been exercised so routinely that we have defined "extra space" as excluding the space occupied by notices required by the Commission. The question raised by TURN's complaint, then, is whether TURN has presented a proposal for use of the billing space that is sufficiently beneficial to ratepayers for us to order implementation of the proposal. See, D.93887, mimeo, p. 157g, as modified. For reasons discussed in this decision, we are persuaded that TURN had presented such a proposal.

Effect of Prior Decision

The ordering paragraphs in D.93887 did not address the extra space issue. PG&E's position is that our statements in D.93887 about the extra space are *dicta* because our discussion of ownership of the envelope space did not address third party access but

was only for the limited purpose of "explaining that a value can be assessed to the 'extra' space" in the context of our determination of whether a PURPA violation existed. Therefore, PG&E concludes our statements in D.93887 about the extra space are not subject to the rules of collateral estoppel or to Public Utilities (PU) Code Section 1709 which states:

> "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

We need not decide this issue to arrive at a proper disposition or TURN's complaint. Whether or not the rules of collateral estoppel apply to our findings and statements in D.93887 as to the ownership of the extra space, those findings and statements were made after a full hearing and opportunity to brief the issues. PG&E has not persuaded us that there is any reason to relitigate those questions at this juncture and we shall not do so. We consider findings of fact 58, 58(a), 59 and 60 of D.93887 as being final for purpose of this proceeding.

Disputed Evidence

PG&E Survey

The effect of D.93887 is also important in dealing with an evidentiary matter which arose during the hearing when PG&E attempted to offer a document of over 100 pages (marked Exhibit 12) entitled "Progress: A Readership Study."

According to PG&E's offer of proof, the document would have shown that "Progress is a useful and efficient use of the billing space, that it is a valued publication received by the ratepayers, and that it has an effective conservation measure [sic] to be presented." (RT 597-598.) Counsel for PG&E also claimed that the document would be useful to the Commission as a basis for determining who would use the billing envelope more efficiently and effectively (generally RT 585-599). In conjunction with this exhibit, PG&E also offered questions and answers 10 through 17

of the prepared testimony of its witness, Gerald W. Sword (marked as Exhibit 11).

Counsel for TURN objected to the admission of both documents on the ground of relevancy and as improper rebuttal testimony. The objection was sustained as to both documents by the ALJ.

In its opening brief PG&E again argues that these documents properly rebut the second sentence of paragraph 11 of the complaint, which states:

> "Therefore, this use of the extra space in the PG&E billing envelope is a more effective use of the economic value of that space than that provided by the existing alternatives, i.e., the dissemination of the 'PG&E Progress' and/or the non-use of the extra space."

PG&E also argues that the ALJ's ruling, which relied on the impropriety of the evidence as rebuttal, applied the rules of evidence and procedure "so egregiously as to deny PG&E procedural due process". (PG&E's Concurrent Opening Brief, p.16.) As a consequence PG&E requests the Commission to reopen the proceeding and accept the complete testimony of Gerald W. Sword and the study. We decline to do that. The ALJ's ruling on these two documents was proper.

PG&E's argument implies that it is necessary or appropriate to weigh the "value" of inclusion of the *Progress*—as measured by ratepayer perception—against whatever other use might be proposed for the extra space—apparently as measured by the same yardstick. In so arguing, PG&E ignores the fact that we laid that issue to rest in D.93887. We said:

> "Use of the space for the *Progress* instead of some other purposes deprives the ratepayers of that 'value' which they own." (P.159b.)

Thus, while in Finding of Fact 60 of D.93887 we stated that the "most efficient means of capturing for ratepayers' benefit the

full economic value of the extra space remains to be determined in a future proceeding," we made that statement in the added context of having determined that the extra space belongs to the ratepayers.

It was not our intent then, nor is it now, to involve ourselves in judging the relative merit of the speech of different factions. "It is not the content [of the *Progress*] that we are concerned with," we stated in D.93887 (p.159d).

By our statement in Finding of Fact 60 we intended to suggest to future complainants that we needed more information in order to decide in a constitutionally equitable and practical manner how to neutrally determine who should have access to the extra space and how such access should be apportioned.

Therefore, any evidence proffered for the purpose of establishing the perceived merit of the content of the *Progress* is irrelevant to this proceeding and was properly excluded.

Thomas C. Long's Testimony

PG&E also offered testimony of Long (Exhibit 10). TURN objected to the admission of questions and answers 5 and 6 and Table 1, and staff joined that objection and also objected to the relevance of questions and answers 7 and 8. After a great deal of oral argument the ALJ took the objections under submission pending receipt of written argument. Examination and cross-examination proceeded as if the testimony had been received.

As counsel for PG&E explained, questions and answers 5 and 6 and Table 1 are for the purpose of showing that the revenue requirement which has been allowed for bill mailing expenses has not been sufficient to cover actual costs due to postage increases in the last several years. We find this evidence is relevant to the jurisdictional issues raised by PG&E and questions and answers 5 and 6 and Table 1 will be received. Question 7 appears to be addressed to the expertise of this witness; however, part of that answer and all of question and answer 8 go to opinion outside

Long's area of expertise. Nonetheless, due to the nature of the inquiry and the extensive cross-examination which took place on these items, we think it inappropriate to delete these questions and answers since it would require a fruitless exercise in determining which part of Long's lengthy cross-and redirect-examination should also be stricken.

Long testified that amounts authorized to be collected for mailing expenses were not sufficient to cover actual costs during certain periods of time between 1971 and 1981 because postage rates rose. He concluded that since PG&E is responsible for bill mailing expense even if rates are inadequate to cover it during the future test year, PG&E "is vested with cost responsibility". This testimony does not alter our opinion regarding ownership of the extra space. Variation between amounts adopted for ratemaking and actual expenses is inevitable in test year ratemaking. It has clearly been this Commission's policy to include in rates an amount sufficient to cover all reasonable bill mailing expense. The fact that in hindsight these amounts did not precisely reflect PG&E's actual expenditures for postage during certain periods of time does not justify treating the extra billing envelope space as the property of the utility rather than of the ratepayers. Nor does this fact change our conclusion regarding this Commission's power to regulate the billing space as part of our overall regulatory authority.

Motions to Dismiss

In addition to the substantive constitutional grounds which we address elsewhere, PG&E has also moved to dismiss the complaint on a number of procedural bases, which are discussed below.

a. Failure to Follow the Commission's Directive in D.93887 to Discuss the First Amendment in the Complaint.

Pointing to our invitation to parties in D.93887 to file a complaint about matters such as this one, and specifically noting our statement that "the considerable First Amendment problems

must be fully addressed in such complaint", PG&E contends TURN's complaint should be dismissed because the complaint itself does not address the First Amendment. PG&E assumes that that is what we meant to require by our statement in D.93887. While our statement might have been more artfully worded, we certainly did not intend to depart from our established practice by requiring legal argument to be part of a complaint. The complaint merely *alleges* the activity or practice which complainant believes to be improper. Legal principles applicable to the allegations are set forth in briefs or oral argument after the facts have been elicited in a hearing.

Our statement about the First Amendment was merely meant to alert any future litigants on this issue that we would not adopt any proposal unless the proceeding instigated by the complaint presented us with a record which fully addressed the First Amendment problems which such a proposal might raise. In this case, the First Amendment problems were first addressed by PG&E in its Motion to Dismiss filed prior to the hearing. The First Amendment issues were addressed further in the parties' responses to PG&E's motion and in their opening and closing briefs. Since the First Amendment problems have been fully addressed as required by D.93887, we will reject the motion to dismiss on this procedural basis.

b. *Failure to State a Cause of Action*

PG&E states that the complaint does not set forth "any act or thing done by any public utility . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission . . . " as required by PU Code Section 1702, the complaint provision.

While this matter may seem to fall between the cracks when PU Code Section 1702 is applied to the facts alleged, there is a broader mandate applicable here. PU Code Section 705 states:

> "Whenever in Articles 2, 3, and 4 of this chapter a hearing by the commission is required, the hearing may be had either upon complaint or upon motion of the commission."

Such a hearing is a prerequisite to our determining whether a utility's practices are "unjust, unreasonable, unsafe, improper, inadequate, or insufficient." Based on that we then, by order or rule, fix the practices to be followed. See PU Code Section 761 (Article 3). PU Code Section 728 (Article 2), which gives us the right to "determine and fix, by order, the just, reasonable, or sufficient . . . practices . . ." to be observed should we find a utility's practices affecting rates to be "insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential . . . ," also requires a hearing.

Thus, we conclude that a complaint alleging unjust or improper practices as was filed here complies fully with statutory requirements and we will deny the motions to dismiss based on that ground.

c. *Failure to Sign Complaint*

PG&E also notes that TURN's complaint in this matter was not signed as required by Rule 4 of our Rules of Practice and Procedure (Title 20, California Administrative Code, Section 4). While this is apparently accurate, it was not noticed by our Docket Office at the time of filing. If it had been, it would have been rejected until remedied. The matter was in hearing before this technical issue arose.

The prepared testimony of the two witnesses for TURN together sponsors each allegation of the complaint. Sylvia Siegel, executive director, and Michel Peter Florio, attorney, testified extensively under oath on both direct- and cross-examination.

The purpose of Rule 4 is to guard against frivolous vexatious, harassing filings by requiring the responsible parties to attest to the allegations.

As a result of Siegel's and Florio's testimony, all the allegations have been attested to and the purpose of Rule 4 has been served. Thus we think it appropriate to invoke the equitable consideration authorized by Rule 87 which, in pertinent part, states:

> "These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, the Commission may permit deviations from the rules. . . ."

Other Jurisdictional Claims

a. *The Dedication Issue*

CAUS takes the position that this Commission may not order PG&E to allow others to use billing envelope space because PG&E has not dedicated that space to public use. Since the space has not been so dedicated, CAUS asserts, the Commission lacks jurisdiction to grant the relief sought. To support this position CAUS cites our decision in *Holocard v. PT&T et al.* (1981) 6 CPUC 2d 649 as corrected by D.92980; modified and rehearing denied by D.93362 (1981). *Holocard* is clearly inapposite to the present matter. That case involved a proposed business (Holocard) seeking an order requiring the utility to participate in the operation of the business to the extent of billing Holocard's customers, on Holocard's behalf. In rejecting Holocard's claim we discussed the traditional principle of dedication of utility property to public service which we have relied upon over the years. Obviously, however, where the property in question (the extra space) belongs to the ratepayer, this principle cannot be applied.

Furthermore, all the dedication cases have in common an attempt to require the utility to commence some new service. As TURN properly points out, "[t]his proceeding simply does not present a dedication question, because TURN is not requesting a new public utility service." (TURN reply brief p.33.)

TURN proposes that we order PG&E to refrain from exercising exclusive control over the extra space so that TURN and perhaps some other entities may have access to it. This is not equivalent to new utility service, it is merely a proposal for more efficient use of existing service. Such Commission action is certainly within the ambit of our statutory authority and consistent with our normal regulation of the billing process.

b. *Management Prerogative*

As both CAUS and PG&E note in their post-hearing briefs, the value of utility property that has been rented to others (e.g. pole space or office space) can be credited by the Commission against revenue requirements in rate setting proceedings. PG&E additionally points out that we may not, consistent with the rule set forth in *Pacific Telephone and Telegraph Co. v. Public Utilities Commission* (1950) 34 C 2d 822, and other earlier cases, interfere with actual management decisions regarding the activities themselves. Whatever validity this argument still may have (see *General Telephone Co. v. P.U.C.* (1983) 34 Cal.3d 817), it does not pertain to property not belonging to the utility.

Furthermore, as the case above makes clear, "[t]he primary purpose of the Public Utilities Act [citations omitted] is to insure the public adequate service at reasonable rates without discrimination." 34 C 2d 822, 826. A practice which recoups the economic value of the extra space for PG&E in addition to recouping the costs of mailing discriminates against the ratepayers since it would be impossible for this Commission to credit any amount certain against revenue requirement because the value of the space might fluctuate from message to message, time to time, and customer to customer, as described in footnote 2, supra. Therefore, we reject the claim of PG&E and CAUS that we lack jurisdiction over the present matter because it constitutes improper interference with a proper management prerogative.

Relative to this management prerogative argument PG&E suggests that even if the billing envelope were public property,

the case law still permits PG&E to deny access to third parties. However, in citing *Danskin v. San Diego Unified School District* (1946) 28 C 2d 536; *Adderley v. Florida* (1966) 385 US 39, 17 L ed 2d 559; and *Lehman v City of Shaker Heights, et al.* (1973) 418 US 298, 41 L ed 2d 770, PG&E misses the crucial point that it is the governmental entity in charge of the public facility which has the prerogative, under certain circumstances, to restrict access to the facility. Presumably, under this line of cases, if we had determined that the billing envelope was public property, which we have not, it would then be the Commission which had the authority to determine how access could be restricted. The conclusion that such authority would rest with PG&E is not supported by these cases.

The Nature of TURN

Both PG&E and CAUS argue that even if the Commission does have the right to order PG&E to make this extra space available to others, allowing TURN such access would still be improper because TURN is not a democratically instituted organization, it is not consumer-controlled, it does not represent a clearly defined class, its claims about whom it represents are inaccurate and overstated, and it has demonstrated that it cannot be trusted to clearly and accurately describe its past role in rate proceedings.

TURN's complaint describes the organization as a

> "... non-profit California corporation ... [which] represents the interests of residential utility consumers generally, as well as specific consumer organizations and constituencies, such as the statewide Consumer Federation of California, a federation of approximately one hundred organizations; the Consumers Cooperative of Berkeley, with a membership of approximately 90,000 families; San Francisco Consumer Action; the California Legislative Council for Older Americans; the California Gray Panthers and other organizations and individuals."

It is correct that TURN is not a membership organization with voting members who decide its policies. The testimony of TURN's executive director, Sylvia Siegel, illustrated that the organization is funded by donations and some grant funds (as well as some PURPA awards[4] granted by this Commission). The organization's policy, however, is set by a board of directors which is comprised of representatives from at least five of the consumer organizations mentioned above.

Siegel's testimony made it clear that while there is certainly no uniformity of interests among ratepayers—even among residential ratepayers whom this proposal specifically addresses—there are many positions which TURN takes regarding PG&E that would be shared by substantially all such ratepayers. These include, she testified, a desire to keep rate of return and evaluation of rate base relatively low. As to issues such as rate design and energy conservation subsidies, Siegel testified that TURN takes positions consistent with the policy its board of directors adopts. So, for example, TURN opposed the ZIP and RCS[5] programs in Commission proceedings because TURN took the position that the programs were subsidized by the nonparticipants—primarily low-income, elderly, and renters. Obviously some residential ratepayers liked these programs; however, it

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[4] The Commission has adopted rules (see California Administrative Code, Title 20, Section 76.01 et seq.) pursuant to PURPA, the Public Utility Regulatory Act of 1978, which provide for the award of reasonable attorneys' fees, expert witness fees, and other reasonable costs to consumer participants in certain hearings involving electric utilities. In order to be eligible for such award the consumer must demonstrate, among other things, significant financial hardship. TURN has received such awards within the past two years, most recently in D.83-05-048 issued May 18, 1983.

[5] ZIP or Zero Interest Program and RCS or Residential Conservation Service are programs under which the utility made no-interest loans to ratepayers for certain home conservation devices and conducted free energy conservation audits of ratepayers' homes.

must be acknowledged that TURN's position represented the interests of a significant group of such ratepayers.

We are unpersuaded by arguments that TURN's claims about itself are so inaccurate as to cast doubt on its veracity. TURN has demonstrated in its testimony and in past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population. It has also demonstrated that it is a properly constituted nonprofit California corporation, and that it is presently involved in Commission proceedings involving PG&E. Furthermore, it has adequately demonstrated during this hearing that it cannot participate in all the regulatory proceedings of PG&E it might otherwise participate in without significant financial hardship.

Merits of TURN's Proposals

As noted above, TURN proposes that the extra space in the billing envelope be used in one of three ways. PG&E and CAUS oppose all of TURN's proposals on the grounds that they are unworkable and ill-conceived. Our Legal Division supports TURN's complaint and recommends that we adopt proposal 3. It believes the proposals 1 and 2 would require excessive Commission involvement and that there is insufficient evidence to adopt these proposals at this time.

Before addressing the merits of TURN's proposals, we note that in other decisions we have recognized the value of effective participation by consumer organizations in Commission proceedings. Further, in our UCAN decision, we specifically recognized how space in a utility billing envelope could be used to allow a consumer organization to communicate with the ratepaying public and solicit voluntary contributions to support ratepayer participation. We stated:

> "There is no question that participation by representatives of consumer groups tends to enhance the record in our proceedings. The California Supreme Court reminded us of

that in deciding *Consumers' Lobby Against Monopolies (CLAM) v Public Utilities Commission* (1979) 25 C 3d 891 which found that the Commission has jurisdiction to award attorney's fees and costs to consumer representatives under certain circumstances. In reaching this conclusion, the Court noted:

> '[T]he staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing (Pub. Util. Code Section 1731) or judicial review (Id., Section 1756) of Commission decisions.' (25 C 3d 891, 908.)

"We hasten to add that our staff is a dedicated, professional, highly competent one. The observation of the Court merely points out an inevitable facet of the unique position of our staff. There can be no denying that the principal representative of the residential and small business ratepayer is in fact the staff, whose job it is to challenge a utility's showing and recommend the minimum rates necessary to ensure adequate service and provide a reasonable return to the utility. The staff, however, may not pursue appeals. Thus, if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in our proceedings . . . .

"Furthermore, while we believe that the opportunities for compensation for participation in our proceedings help assure the development of a full and fair record, we recognize the merit of the Center and Simmons' contention that such opportunity may seem illusory to an individual ratepayer. What the complainants propose is another alternative, which relies neither upon increased funding through rates nor necessarily upon compensation under one of our present procedures. It appears that there are many ratepayers in SDG&E's service area who would relish the opportunity of belonging to an organization which could afford to hire

> people with technical expertise to represent their particular interests in proceedings as technical as most of our major cases are. In fact, many of these ratepayers have written to us to express their support of this UCAN proposal." D.83-04-020, mimeo., pages 7-8.

Based on the evidence and arguments presented in this proceeding, we believe that, in general, TURN's proposals are meritorious. Under each proposal, residential ratepayers in PG&E's service territory would be given an opportunity to be informed of and to support advocacy efforts on their behalf through use of the extra space in the billing envelope. We believe that this would be an appropriate and efficient use of the extra space.

With respect to the specific variations offered by TURN, we believe that it would be premature for us to adopt proposals 1 or 2 at this time. These proposals envision a number of qualified consumer organizations participating in the checkoff program. The organizations would be listed on the materials inserted in the envelope, receive monies contributed by ratepayers, and share in program expenses. To date, however, TURN is the only organization which has sought access to the PG&E billing envelope. Thus, it would be the only organization participating in the checkoff program for an indefinite period of time. Under these circumstances, we believe that the mechanisms outlined in proposals 1 and 2 are neither necessary nor practical at this time.

While we are not adopting proposals 1 or 2 in this proceeding, we are not foreclosing the adoption of similar proposals in the future. Indeed, a checkoff mechanism whereby ratepayers can select among a number of qualified consumer organizations may be both necessary and desirable in situations where more than one organization has sought access to the envelope. We agree

with TURN that an essential element of such a mechanism is the development of neutral criteria to determine eligibility.[6]

In this case we will follow our Legal Division's recommendation and order that proposal 3 be implemented with some modification. We will require PG&E to give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E will be permitted to continue to insert the *Progress* during the remaining eight months and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted.

In this regard, the fact that the extra space is ratepayer property does not affect the fact that PG&E's ability to communicate with its customers also is or may be a beneficial use of that space. Our goal, as expressed in D.93887, is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E. Implicit in this assumption, of course, is the the ongoing availability of PG&E's views. Currently, no controls are placed on the content of the *Progress* and we will not undertake to control the material inserted by TURN.

We will establish certain requirements to ensure that the process works smoothly. First, priority must be given to the billing and legally-mandated notices to customers. If TURN is prevented from inserting its material during any month because of this priority, it shall be allowed access during another month. This alternate month shall be at TURN's choosing. Otherwise, TURN shall be bound by the schedule discussed below.

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[6] We note that in C.83-08-04 and C.83-12-03 several consumer groups including TURN are seeking access to space in the Pacific Bell envelope. The checkoff mechanisms are among the proposals now under consideration in those proceedings.

Second, TURN shall reimburse PG&E for any costs the company incurs beyond its usual cost of billing that directly result from the addition of TURN's material. Similarly, shareholders should bear costs associated with inserting the *Progress*. We note that currently such costs are not separated from other costs of preparing the billing envelope and are not treated below the line for ratemaking purposes. This practice should cease and all identifiable costs should be assigned to shareholders. We believe that these costs are minimal.

Third, all of TURN's bill insert material should clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.

Fourth, funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E.

Fifth, TURN will be required to establish an adequate mechanism to account for the receipt and disbursal of funds received through the bill insert process.

Sixth, we will require TURN to prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report should describe TURN's efforts on behalf of PG&E's residential ratepayers in the past year. It should also include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers. The first report should be distributed on or before February 1, 1985 and should cover calendar year 1984. A second report should be distributed one year later. Copies of TURN's reports should be filed with this Commission within five days of distribution.

Our order today does not cover every possible contingency. Therefore, in addition to complying with the requirements set forth above, we expect PG&E and TURN to work together in good faith to overcome problems. If insurmountable problems

arise, we may have to issue further clarifying orders. We hope this will not be the case. We want the program to work and we want the parties to make it work.

Actual insertion of TURN's material shall commence 30 days after TURN files a notice with this Commission indicating that an adequate mechanism has been established to account for the receipt and disbursal of all contributions received through the insert process. TURN should describe the mechanism in its notice. The notice should also identify the months over the next two years during which TURN plans to utilize the extra space. Both PG&E and TURN will be bound by this schedule.

Our action today should not be viewed as restricting access to TURN. The adoption of this proposal in no way precludes other proposals from being considered. Should other proposals be brought before us, we will consider the feasibility and benefits of each at that time. If we find that these proposals are meritorious, we could order that extra space be made available for the new program along with any previously authorized ones. Alternately, we could modify today's decision to provide for the implementation of a checkoff program as discussed above. This is consistent with the approach adopted in our UCAN decision.

Constitutionality of Commission Regulating the Use of the Billing Envelope Extra Space

Although we have already stated that the question of who owns the extra space should not be relitigated in this proceeding, we are also mindful that the constitutional arguments which PG&E (and to a lesser extent CAUS) has raised are jurisdictional in nature. Therefore, despite our conviction that the issue was properly determined in D.93887, we address below the constitutional claims made by PG&E. Four such claims were made: that the First Amendment to the United States Constitution prohibits the Commission from regulating envelope use; that the First Amendment prohibits the Commission from requiring

PG&E to distribute the message of others; that TURN's proposal violates the equal protection provisions of both the United States and State constitutions; and that TURN's proposal constitutes an unlawful "taking" of property under the Fifth and Fourteenth Amendments to the United States Constitution.

a. *Regulation of Use of the Extra Space by the Commission*

The most basic opposition to the Commission's adoption of TURN'S proposal is grounded in PG&E's claim that the First Amendment to the United States Constitution deprives us of jurisdiction over the regulation of the use of the billing envelope extra space.

The pivotal cases on this are *Consolidated Edison Co. of New York v Public Service Commission of New York* (1980) 447 US 530 (*Con Ed*) and its companion, *Central Hudson Gas & Elec. Corp. v Public Service Commission of New York* (1980) 447 US 557 (*Central Hudson*). These cases both involved attempts by our analogue in New York, the Public Services Commission (PSC) to prevent utilities from including certain kinds of inserts in its billing envelopes. *Con Ed* involved political advertising in support of nuclear power. *Central Hudson* involved advertising promoting the use of electricity. The U.S. Supreme Court found that each of these types of expression was protected by the First Amendment.

While PG&E claims that the TURN proposal violates all the constitutional standards for First Amendment regulation, we believe that even assuming these tests are applicable, all those standards have been met by the proposal version we adopt here.

1. *Time, Place, and Manner Restriction*

The court in *Con Ed* specifically held that it had long recognized

> "... the validity of reasonably time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication." 447 US at 535.

The court made it clear that such regulation "may not be based upon either the content or subject matter of speech." 447 US at 536. Assuming for argument that PG&E has some property right in this extra space, the proposal which we adopt here would be a "reasonable time, place, or manner" restriction in that it requires PG&E to share the extra space with TURN for a purpose which significantly benefits ratepayers. Our order also leaves PG&E with "ample alternative channels for communication." Indeed, PG&E is allowed to use the extra space to communicate to ratepayers two-thirds of the time over the next two years. However, the restriction does not impinge on the content or subject matter of PG&E's messages. Therefore, the proposal as adopted meets this standard.

2. *Permissible Subject Matter Regulation*

PG&E claims that the TURN proposal requires the Commission to indulge in impermissible subject matter regulation in that it asks the Commission to find that the proposed use of the billing envelope is a better use than PG&E's present use of the billing envelope. In effect, PG&E asserts, TURN is asking the Commission to "evaluate the contents and purpose of its proposed message, versus the contents of PG&E printed materials." (PG&E's Motion to Dismiss, p. 16) PG&E mischaracterizes TURN's proposal. The proposal does not require the Commission to look at content at all. It only attempts to respond to our invitation for suggestions on how to use the economic value of the extra space more efficiently for the ratepayers' benefit. To the extent that the proposal as adopted restricts PG&E's use of the extra space, it does so on the grounds that the space belongs to the ratepayers and that this restriction is made pursuant to our overall regulatory authority, not on the basis of content. In any case, the proposal as we adopt it is neutral as to content of the parties' messages and, therefore, meets this subject matter standard.

3. *Narrowly-tailored Means of Serving a Compelling State Interest*

As PG&E asserts, when a party advocates that the State regulate a fundamental right, such as PG&E's First Amendment right to speak, there must be a demonstrable compelling State interest for such regulation. See, for example, *Louisiana v NAACP* (1961) 366 US 293, 6 Legal Ed 2d 301 cited by PG&E. In that case the Supreme Court in a 5-page decision found unconstitutional two Louisiana statutes, one of which required certain organizations to file annual affidavits that the officers of their foreign affiliates were not members of subversive organizations, and the other of which required the organization to file a list of the names and addresses of all its members and officers in the State. The court held that such governmental regulation violated First Amendment guarantees because it could have the effect of stifling, penalizing, or curbing "the exercise of First Amendment rights", and was thus not narrowly enough drawn to "prevent the supposed evil" it was meant to prevent. (366 US at 297.)

In the present matter a compelling State interest in regulating the use of the extra space has been demonstrated and the TURN proposal as we adopt it does regulate that use in a constitutionally permissible way.

The compelling State interest is one we set forth in our *UCAN* decision:

> "The State interest, of course, is the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." (D.83-04-020 at p.17.)

The fact that we have adopted a shared approach to use of the extra space surely exhibits the "narrowly-tailored means of serving a compelling state interest" that the *Con Ed* court contemplated.

Of course this issue only arises where the governmental entity is restricting some right that the party in question possesses. Here, PG&E claims that the right is the right to speak through unregulated and exclusive use of the extra billing envelope space. As we have reiterated many times now, since that space is not the property of PG&E in the first place, it has no right to use the space for First Amendment purposes.

Distributing the Message of Another

PG&E cites, among others, the cases of *Wooley v Maynard* (1977) 430 US 705 and *Miami Herald Publishing Co. v Tornillo* (1974) 418 US 241 for the clear proposition that the First Amendment right to free speech also includes the right to refrain from speaking and the right not to be compelled by government to publish that which one does not wish to publish. PG&E contends that each of these rights is breached if we order it to permit access by another to the extra space in its billing envelopes and allow messages of those entities to be carried in that extra space.

This argument, of course, again assumes that we are asking PG&E to publish the messages of TURN or others. In fact, as we explained above, we are simply ordering PG&E, which has physical control over the billing space, to make it available for the benefit of ratepayers. We are not asking PG&E to publish anything as its own. In fact, in order to protect against the possibility that one receiving a PG&E billing envelope would assume all its contents were generated by the utility, we will require that all of TURN's bill insert material clearly identify TURN as its source and state that their contents are not endorsed by PG&E.

In addition to ordering PG&E to make the space available we are also ordering it to do one thing further, and that is to use its equipment to put the inserts of others into the billing envelope extra space. We do not believe that this act is equivalent to publication. It is merely a requirement clearly within our statutory authority to regulate the practices of the utility. Of course,

we will require that TURN pay to PG&E all costs which PG&E incurs beyond its normal billing costs. We have chosen this method of inserting these messages over any other because it appears to be the one which will result in the lowest cost to the ratepayers as well as the least disruption to the utility's billing process.

Distribution of the message here is incidental to the right of the ratepayers to use the extra space, We conclude that these circumstances do not violate the First Amendment protections against being required to publish the statements of others.

Equal Protection

PG&E claims that TURN's proposal violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal protection provision of the California Constitution at Article I, Section 7, because (1) the consumer advocate is given a preferred position vis-a-vis the utility; (2) consumer advocate groups representing residential ratepayers are treated differently from consumer advocate groups representing nonresidential ratepayers; (3) the Commission is forced to draw distinctions, even among residential consumer advocate groups, between those who meet the criteria of technical competence and those who do not (see PG&E's Motion to Dismiss, p.31). PG&E's argument implies that because a fundamental constitutional right is involved—First Amendment freedom of speech—the Commission must show a compelling state interest for discrimination of the sort described. We have already described that state interest above.

We believe TURN's proposal, as we have adopted it, furthers this interest by assuring more complete ratepayer understanding and participation in energy issues involving their utility. Furthermore, the discrimination alleged does not exist. First, the proposal as we are adopting it permits TURN and the utility to share the extra space. Secondly, no other ratepayer organizations have sought access to the extra space. As discussed above, nothing in

the proposal as we are adopting it prohibits others from seeking access too.

We therefore perceive no equal protection violations.

Taking of Property

Additionally PG&E propounds the argument that use of the extra space in the billing envelope by others constitutes either a taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution or a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments.

Again, the argument rests on PG&E's continued contention that the entire billing envelope, including the extra space, is its private property. Based on this, PG&E distinguishes the circumstances of its billing envelope from the case of *Pruneyard Shopping Center v Robins* (1980) 447 US 74, 64 L ed 2d 741, which upheld an interpretation of the California Constitution's provisions regarding free expression and petition requiring the owner of a shopping center to permit students to distribute literature and seek support for their petitions. The U.S. Supreme Court found that this interpretation did not amount to a taking under the Fifth or Fourteenth Amendments. PG&E points to the fact that the Supreme Court emphasized that the shopping center differed from other private property in that by choice of its owner it was not limited to the owner's personal use, but was "open to the public to come and go as they please". (Id p.87).

We note, however, that, in context, this observation of the court was used to explain that: "The views expressed by members of the public . . . thus will not likely be identified with those of the owner." (Id p.87.) We are adopting a similar safeguard by requiring that TURN clearly identify its material and state that it has been neither reviewed nor endorsed by PG&E. So, even if the billing envelope were regarded as PG&E's private property, the distinction cited by PG&E is irrelevant.

PG&E also cites the California Supreme Court's decision in *Pacific Telephone and Telegraph Co. v Public Utilities Commission* (1950) 34 C 2d 822 as support for its conclusion that no ratepayer property rights can devolve from ratepayer payment of bill mailing expense. PG&E cites the court's quotation from a 1913 case where it states:

> ". . . And, finally, it may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would be better served thereby . . ." (Id pp.828-829 quoting *Pacific Telephone Etc. Co. v Eshleman* (1913) 166 C 640, 665.)

We think PG&E's reliance on this language is misplaced. The very central point PG&E ignores here is that the extra space is *not* "property held by [PG&E] in ownership". As discussed above, the extra space is a byproduct of the billing process which is paid for by ratepayers.

PG&E also cites *Board of Public Utility Commissioners v New York Telephone Co.* (1926) 271 US 23, 70 L ed 808 for the proposition that ratepayers cannot acquire any interest in the property "used for their convenience". (271 US at 32.) That case, however, had to do with a Commission requiring a utility to set rates at a rate that was conceded to be less than projected costs in order to make up for high returns in a previous year. The court's final statement explains the context in which it discussed ratepayer property rights:

> "The property or money of the company represented by the credit balance in the reserve for depreciation cannot be used to make up the deficiency [between actual return and conceded expense]."

The Supreme Court was clearly not prohibiting ratepayers from having property rights in objects associated with the utility's enterprise, rather it was stating that a Commission could not treat the utility's accounts as if they belonged to the ratepayers who contributed the money to them by paying for service. This concept has no bearing on the one now before us.

In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious.

Finally, even assuming that the extra space is PG&E's property, it must not be forgotten that PG&E is a monopoly utility closely regulated by this Commission pursuant to authority derived from this State's constitution. Article XII, Section 6, states:

> "The commission may fix rates, *establish rules*, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." (Emphasis added.)

Section 5 states:

> "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission . . ."

And, the Legislature has enacted PU Code Section 701, which states:

> "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are

> necessary and convenient in the exercise of such power and jurisdiction."

This constitutional and statutory authority provides sufficient basis for a determination by the Commission that PG&E must make the billing space available to its ratepayers, or to representatives of those ratepayers.

Findings of Fact

1. This Commission determined in D.93887 as amended that the extra space in PG&E's billing envelopes has economic value, and that the economic value was created by the ratepayers.

2. Quantification of the economic value of the extra space is subjective and imprecise because it is based on many variables.

3. This Commission determined in D.93887 as amended that the 'extra space' in PG&E's billing envelopes belongs to the ratepayers.

4. This Commission determined in D.93887 as amended that PG&E was itself reaping the economic value of the extra space and by such use was depriving the ratepayers of that value.

5. This Commission in D.93887 declined to order PG&E to take any action to remedy the inequity created by its use of the extra space and the deprivation of the value of that space as to the ratepayers because the record was insufficient for the Commission to determine how the Commission could direct PG&E to use the extra space more efficiently for the ratepayers' benefit.

6. In D.93887, this Commission issued an invitation to TURN or any other interested party to file a complaint with the Commission which would expand the record, especially addressing First Amendment problems, so that the Commission might issue an appropriate order to PG&E regarding how it should use the extra space more efficiently for the ratepayers' benefit.

7. By the present complaint TURN complied with the Commission's invitation in D.93887.

8. TURN's complaint lists three alternatives for utilization of the extra space by itself and possibly other residential consumer advocacy organizations.

9. First Amendment issues were addressed by the parties in written briefs and motions filed with the Commission.

10. At the hearing TURN moved to strike questions and answers 5 and 6 and Table 1 of Exhibit 10, the testimony of PG&E's witness, Thomas C. Long. Staff moved to strike questions and answers 7 and 8 of the same witness. The ALJ took the motions under submission.

11. At the hearing TURN objected to the introduction of PG&E's Exhibit 12, a document entitled "Progress: A Readership Study" and also objected to questions and answers 10 through 17 of Exhibit 11, the prepared testimony of PG&E's witness, Gerald W. Sword, on the same subject. The ALJ sustained the objection.

12. PG&E's requests that the hearing be reopened to permit receipt of the excluded part of Exhibit 11 and Exhibit 2.

13. At the hearing PG&E moved to dismiss for failure of TURN to allege a violation as required by PU Code Section 1702. The motion was denied by the ALJ.

14. PG&E moved to dismiss for TURN's failure to address First Amendment problems in the complaint itself, claiming that this was required by this Commission's mandate in D.93887.

15. PG&E moved to dismiss for TURN's failure to sign the complaint as required by Rule 4 of the Commission's Rules of Practice and Procedure.

16. CAUS claims this Commission lacks jurisdiction over this matter because PG&E has not "dedicated" the billing envelope space to public use.

17. PG&E and CAUS both claim this Commission lacks jurisdiction over this matter because it would interfere with a proper management prerogative.

18. PG&E argues that this Commission is forbidden by the First Amendment from regulating the use of the billing envelope or requiring PG&E to distribute the messages of third parties.

19. PG&E claims that TURN's proposal would violate the equal protection provisions of both the United States and State Constitutions (Fourteenth Amendment and Article I, Section 7, respectively).

20. PG&E claims that TURN's proposal would constitute a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

21. TURN has demonstrated to this Commission an ability to represent a substantial group of ratepayers in Commission proceedings involving the service or rates of PG&E. Further, TURN has demonstrated that it is a properly constituted nonprofit California corporation, that it is presently involved in Commission proceedings involving PG&E and that it cannot participate in all PG&E proceedings it might otherwise participate in without significant financial hardship.

22. Proposals 1 and 2 envision the participation of a number of consumer organizations.

23. To date, TURN is the only organization which has sought access to the PG&E billing envelope.

24. Costs associated with inserting PG&E's *Progress* are not separated from other costs of preparing the billing envelope and are not treated below the line for ratemaking purposes.

25. The extra space in the billing envelope is a direct consequence of the utility billing process and the way postal costs are assessed.

26. The billing space is inextricably related to routine utility activity.

27. This Commission has allowed utilities to recover all reasonable billing expenses from ratepayers.

28. This Commission has required and permitted utilities to use the billing space as a communications medium for the benefit of ratepayers.

29. Participation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff.

30. TURN's proposal will help assure the fullest possible participation in our proceedings.

Conclusions of Law

1. This Commission's findings on the issue of ownership of the extra space in PG&E's billing envelope in D.93887 as modified should not be relitigated in this proceeding.

2. Findings of Fact 58, 58(a), 59 and 60 of D.93887 as modified should be considered final for the purpose of this proceeding.

3. Objection to the testimony of Thomas C. Long is properly overruled. The testimony should be received.

4. The ALJ's sustaining of the objection to the introduction of all of Exhibit 12 and questions and answers 10 through 17 of Exhibit 11 was proper and the request to reopen should be denied.

5. PG&E's motion to dismiss for failure to allege a violation as required by PU Code Section 1702 was properly denied by the ALJ.

6. The motion to dismiss for failure to address the First Amendment problems in the complaint itself should be denied.

7. The motion to dismiss for failure to sign the complaint as required by Rule 4 of our Rules of Practice and Procedure should be denied.

7a. Under the State Constitution and Public Utilities Code, this Commission has the authority to regulate the billing process and to ensure that billing space is used for the benefit of utility ratepayers.

8. The "dedication" concept does not affect the Commission's jurisdiction over this matter.

9. The Commission's assertion of jurisdiction over this matter does not interfere with a proper management prerogative.

10. The First Amendment to the United States Constitution does not deprive this Commission of its ability to regulate the usage of the billing envelope or to require PG&E to distribute the messages of third parties.

11. The TURN proposal as implemented by this decision does not violate the equal protection provisions of either the United States or California constitutions.

12. The proposal as implemented by this decision does not constitute a taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

13. TURN'S access to PG&E's billing envelope should be contingent on its filing with the Commission notice indicating that an acceptable mechanism has been established to account for receipt and disbursal of all funds obtained through billing envelope solicitation and the months over the next two years TURN plans to insert materials.

14. Proposals 1 and 2 should not be adopted at this time.

15. Proposal 3 should be adopted as modified in this decision.

16. Adoption of proposal 3 as modified should not foreclose the implementation of future meritorious proposals.

ORDER

IT IS ORDERED that:

1. The complete testimony of Thomas C. Long, taken under submission at the hearing subject to legal argument, is received in evidence.

2. The Administrative Law Judge's (ALJ) exclusion of Exhibit 12 and questions and answers 10 through 17 of Exhibit 11 is affirmed and the request to reopen the hearing to receive this evidence is denied.

3. The ALJ's denial of Pacific Gas and Electric Company's (PG&E) motion to dismiss for failure to comply with Public Utilities Code Section 1702 is affirmed.

4. PG&E's motion to dismiss for failure of Toward Utility Rate Normalization (TURN) to address, in the complaint itself, the First Amendment problems is denied.

5. The complaint of TURN is granted to the following extent:

(a) PG&E shall give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E shall be permitted to use the extra space during the remaining eight months and may also make use of any extra space not used by TURN during the months TURN's material is inserted.

(b) PG&E and TURN shall each determine the content of its own material.

(c) Priority shall be given to the billing and legally-mandated notices to customers. If TURN is prevented from inserting its materials during any month because of this priority, it shall be allowed access during another month. This alternate month shall be at TURN's choosing.

(d) Costs of inserting materials in the extra space shall be borne by the sponsor of the materials. PG&E shall bill

TURN for all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials. Costs associated with inserting the *Progress* shall be separated from other billing costs and assigned to shareholders.

(e) All of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.

(f) Funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E.

(g) TURN shall establish an adequate mechanism to account for the receipt and disbursal of all funds received through the bill insert process.

(h) TURN shall prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report shall describe TURN's efforts on behalf of residential ratepayers in the past year and include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers. The first report shall be distributed on or before February 1, 1985, and cover calendar year 1984. A second report shall be distributed one year later. An original and 12 copies of TURN's reports shall be filed with the Commission's Docket Office within 5 days of distribution.

(i) Actual insertion of TURN's materials shall commence 30 days after TURN files a notice with this Commission indicating that an adequate mechanism has been established to account for the receipt and disbursal of all funds received through the bill insert process. TURN shall describe the mechanism in the notice. the notice shall also identify the months over the next two years during which

TURN plans to access the extra space in the billing envelope. Except for the provisions of subparagraph (c) above, both PG&E and TURN shall be bound by the schedule in this notice.

This order becomes effective 30 days from today.

Dated December 20, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
Commissioners

I dissent in part.
/s/ VICTOR CALVO
Commissioner

I dissent.
/s/ WILLIAM T. BAGLEY
Commissioner

Separate Opinions Concurring with and Dissenting from Decision No. 83-12-047

COMMISSIONER VICTOR CALVO, concurring and dissenting in part,

Today's decision represents a significant step towards broader public participation in our proceedings. The use of the extra space in the billing envelope by organizations representing residential ratepayers can only enhance the decision-making process.

Along with my three colleagues, I fully concur that the value of the extra space which remains in the billing envelope ought to inure to the benefit of the ratepayer. Likewise, I fully concur that providing access to the billing envelope to an organization like TURN is desirable. I also anticipate that the same high quality of performance from TURN will prevail in its use of the billing envelope.

Having said this, I feel compelled to dissent in part from the adopted decision. I do so because I have serious reservations about the procedures adopted in the decision rather than the substance of the decision itself.

Specifically, I am troubled by three aspects. First, the decision gives TURN access to the billing envelope four times a year for the next two years. Although TURN is required to file an annual report with the Commission, I would have preferred a procedure which would have established a complete Commission review of the entire experiment after one year. A year's experience would have allowed this Commission to make valuable comparisons of this proposal and the UCAN experiment. At the end of a year's time we would also have been afforded the opportunity for a full review and a complete evaluation of these programs. My concern is that the decision does not formally allow the Commission a realistic opportunity to review the experiment until after a full two years have passed. While I recognize that the Commission may reopen this proceeding at any time, the expectation we have created by this decision is that we should not need to do so until

the two years have elapsed. I am not comfortable with this approach.

The second aspect which concerns me is that there is no formal creation of a panel or board to resolve disputes which are likely to arise between TURN, or any other representative group, and PG&E. I would have preferred for our order to have directed PG&E and TURN to establish an arbitration-type panel, perhaps consisting of one member each from PG&E and TURN, and a third member chosen by both. By creating an arbitration panel, there would be an incentive on the part of both parties to tailor the ratepayer-sponsored bill inserts in a manner that would encourage greater accuracy of content and also eliminate controversy, thus better serving the ratepayer.

The last aspect which concerns me is that the decision does not sufficiently emphasize that TURN is not to be given exlcusive access to the billing envelope. I strongly believe that any other organization meeting the criteria set forth in our decision should be afforded access equal to that given TURN and that there be specified a precise and relatively simplified method for Commission review and decisionmaking.

For all of the reasons set forth above, I concur and dissent.

/s/ VICTOR CALVO
Victor Calvo, Commissioner

December 20, 1983
San Francisco, California

WILLIAM T. BAGLEY, Commissioner, Dissenting:

The Commission majority would create a ratepayer property right, equitable in nature, in the surplus space (i.e., unused postal weight allowance) of billing envelopes mailed to customers by the Pacific Gas and Electric Company. The Commission's acknowledged premise is that such unused space has economic

value (which could be sold) and that such value is contributed to and thus created by the utility ratepayer.[1]

The conclusion in this proceeding, flowing from such premise, is that a single entity representing ratepayers (TURN) is clothed with a property interest in and is thus granted the right to use this "extra space" in four of the monthly billings per year and, by so doing, to preempt and supplant the otherwise constitutionally protected rights of the defendant.[2]

As admirable as the intent may be and as helpful to this Commission and to the ratepayer as the TURN organization is, the majority thus embarks upon a legal journey which reduces itself to an absurdity. Further, basic free speech constitutional rights would be overridden by this question-begging creation of the equitable right in question. In that context, this is a very illiberal decision.

This decision comes complete circle in its rationale and also in its attempt at an evolutionary creation of an equitable-type

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[1] *Pacific Gas and Electric Co.* (1981) . . . Cal.P.U.C.2d . . ., Decision (D.) 93887 (as modified by D.82-03-047 issued March 2, 1982), "We think there are or may be many other uses for the 'extra' space. That such space could be sold to public advertisers (without any extra postage costs) at once demonstrates that the space surely has value. That economic 'value' belongs to the ratepayers, who create the space by paying for the envelope and postage." (Mimeo at p.159b.) See related Findings of Facts 58, 58a, and 59. (Mimeo at pp.220-221.)

[2] "We will require PG&E to give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E will be permitted to continue to insert the *Progress* during the remaining months." Further, "It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views . . . ." (Majority opinion at p.23). It is reasonable to state that this last sentence demonstrates the unconstitutional rationale of the majority opinion. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 538 (62 L.Ed.2d 319, 100 S.Ct. 2326).

property right. Its ostensible ingenuity is only surpassed by its legal illogic. Seemingly taking a cue from the early English High Court of Chancery and finding no remedy at law (i.e., constitutional and statutory authority), and also finding First and 14th Amendment obstacles, it creates an *in personam* right to speak forthcoming from a "property" right in the forum. It thus would obviate all constitutional questions.

This rationale attempts to follow some early equitable principles and at the same time begs the question at issue—whether this Commission has constitutional and statutory powers to order this procedure. This is made evident and obvious by the decision's limited two page (pp.15, 38) discussion of statutory authority and the extensive discussion of the ostensible equitable right.

That such statutory powers of this Commission are limited is the subject of the recent California Supreme Court decision in *Consumers Lobby Against Monopoly v. Public Utility Commission* (1979) 25 Cal.3d 891 (160 Cal.Rptr. 124, 603 P.2d 41). The Court there commented upon both equitable and statutory (Sections 701 and 728 of the Public Utilities Code) powers. The lead opinion stated that the Commission's statutory powers did not extend to awarding attorneys fees, and that its equitable powers only applied in quasi-judicial reparations cases but not in quasi-legislative ratemaking proceedings. (At pp.909-910.) "TURN's theory [of public participation costs] cuts far too broadly . . . and the *consequences of such an interpretation would go far beyond the circumstances presented in this case.*" (Emphasis added). (At p.911).

That latter quotation of our Supreme Court could not be more appropriate in this instant matter. What is this illusory equitable right which would be created and how far would it extend? Is it a constructive trust based on some type of wrongdoing or mistake or perhaps a resulting trust based upon implied intent? Can there be, in California, any type of trust not based upon statute? (*McCurdy v. Otto* (1903) 140 Cal. 48, 73 P. 748.) Or is it an

equitable lien which if not imposed would result in unjust enrichment? (Restatement of Restitution, Section 161.) Perhaps its basis is Henry VIII's Statute of Uses (1536), the central provision of which according to Maitland was "the declaration that where ever one was seised to the use of another, he who had the use should be deemed to have a legal estate corresponding to the interest he had in the use." (J. Cribbet, C. Johnson, Cases and Materials on Property, (4th Ed. 1978) p.297. But the statute of uses has no application under California law. (*Estate of Fair* (1901) 132 Cal. 523, 60 P. 442.)

Regardless of source, what are "the consequences beyond the circumstances presented in this case"? The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle—to name just a few relevant examples—have "excess space" and "economic advertising value". Some utility corporations place bumper-strip messages on their vehicles. Buses and trucks regularly carry advertising messages. In the words of the majority at page 23 of the decision, "It is reasonable to assume that the ratepayers will benefit from exposure to a variety of views . . . ." Is it the postulate of this Commission, flowing from the decision's stated premise, that any three Commissioners at any time might decide that ratepayers would benefit from exposure to some particular socially desirable message from some ratepayer group making use of any or all such areas of excess valuable space? Could the Gun Owners of California, Inc., headed by a politically-active State Senator, convince three future members of this Commission that it should be allowed to promote wood-cutting and wood burning messages to ratepayers as a fuel conservation aspect of the group's espoused rural ethic? And then use that "excess space" message to raise funds to be used by it on behalf of ratepayers. Similarly, the Sierra Club, by a finding of three Commissioners, after an on-the-record proceeding, could be said to represent the conservation interests of ratepayers in ratemaking cases and thus, also, be allotted some of the excess space for recruiting and fund-raising purposes.

And once established as a right, perhaps ultimately *in rem* rather than in the *ad hoc, in personam* method here established, is the right subject to defeasance? Will there not be writs of mandate entertained to protect this established property right in the valued excess space? Of interest, see *Sierra Club v. Morton* (1972) 405 U.S. 727 (92 S.Ct. 1361) which affirmed the Circuit Court and held against plaintiff's standing to sue:

> But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so. (At p.739)

This dissent need not elaborate on the freedom of speech issue which permeates this proceeding. It is sufficient to refer to *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 537 where the Supreme Court states:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that government has no power to restict expression because of its message, its ideas, its subject matter, or its content."

But it should be specially noted that this very same Commission, with three of the present majority sitting and without dissent recently stated in *Frankel v. Pacific Gas and Electric Company* (1982) ... Cal.P.U.C.2d ..., D.82-07-009 at mimeo p.3;

> We have ruled that while we may disallow advertising expenses [to be charged to ratepayers] which we will find unreasonable, *we cannot issue gag orders without interfering with a utility's freedom of speech rights.* We adhere to this determination. The U.S. Supreme Court has specifically disapproved advertising prohibitions by regulatory commissions, and has specifically held that the right of free speech extends to corporations. (*Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm. of N.Y.* (1980) 447 U.S. 557; *Consolidated Edison Co. v. Pub. Serv. Comm. of N.Y.* (1980) 447 U.S. 530. (Emphasis added.)

The *Frankel* decision responded to a specific complaint asking that this Commission prohibit the Pacific Gas and Electric Company from publishing certain post-storm promotional messages. It should also be noted that the instant decision effectively prohibits the same defendant from bill-mailed free speech messages during four months of the year. Free Speech is allowed for the remaining two-thirds of the billing year.[3] On that very point, and with the same parties before it, this Commission in the immediate predecessor decision to this proceeding said:

> Even more importantly, it is incumbent on TURN to demonstrate whether it is permissible to ban the *Progress* entirely if we simply intend to use that "extra" space for conservation messages, or other speech, composed by the Commission, interested public participants such as TURN or other parties. This might simply be a substitution of one form of speech for another, a preference for governmentally sponsored or governmentally allowed speech. Such a preference could be more dangerous than the evil which TURN seeks to correct. *Pacific Gas and Electric Co.* (1981) ...Cal.P.U.C.2d..., ..., D.93887 mimeo at p.159e.

Much of the above makes reference to the formation and characterization of certain property and equitable rights and may leave the impression that such rights are thought to be static and

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[3] "PG&E will be permitted to continue to insert the *Progress* during the remaining months." (Majority opinion at p.23.)

sterile—that the defendant's physical ownership and possession of property alone should dictate the result. Such intent should not be inferred. To the contrary, it is acknowledged that:

> (A)n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago. The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion. (5 Powell, Real Property (1970) Section 745, pp.493-495.)

But here we deal with more than just a classical property right defense to some type of governmental action or constriction affecting property *per se*. Though certain 14th Amendment property rights have been diluted over the years *vis a vis* an owner's claimed right of usage of the property itself,[4] it is submitted that property rights have never been and should never be eroded, and by judicial fiction transferred to others, in order to justify a governmental constriction on First Amendment principals of free speech. Therein lies a major distinction present in this case.[5]

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[4] See discussion in *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201 (161 Cal.Rptr. 742, 605 P.2d 381) including references to Civil Code Section 1009 adopted after *Gion-Dietz*. See also discussion in *Agins v. City of Tiburon* (1979) 24 Cal.3d 266 (157 Cal.Rptr. 372, 598 P.2d 25).

[5] See *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 540, "But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests in a government in overseeing the use of its property."

In the face of these basic constitutional rights, applicable to all, the majority proposes to create an equitable right which it states will, in the name of ratepayer protection, obviate all concerns and supervene all constitutional constraints. Additionally and unavoidably, the majority decision would result in a legal and administrative morass caused by future extensions of the Commission's decreed property right. Such an exercise is as dangerous as it is unprecedented and unwarranted in the law. If further citation is desired for the proposition that no such right exists, see *Fields v. Michael* (1949) 91 Cal. App.2d 443, (205 P.2d 402).[6]

/s/ WILLIAM T. BAGLEY
William T. Bagley,
Commissioner

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[6] "That no direct authority upon it has been produced must be due alone to the fact that legal evolution had not progressed far enough to develop a needless precedent for a necessary conclusion." 91 Cal.App.2d at p.451.

Separate Opinions Dissenting From Decision No. 84-05-039

COMMISSIONER VICTOR CALVO, Dissenting.

This Commission has done much during its history to ensure full and fair public participation in matters heard before it. Our liberal rules of standing, procedure and evidence are a testament to that history. Today, the majority attempts to expand public participation by permitting Toward Utility Rate Normalization (TURN), a respected and frequent intervenor in our proceedings, to directly solicit interest and funding from the ratepayers of Pacific Gas and Electric Company (PG&E) through the use of the extra space in the billing envelope PG&E sends to its ratepayers. I laud the effort, but for the reasons set forth below, I cannot support it.

The "extra" space in the PG&E billing is really not a "property" but is something of an accident. Relevant postage rates, being based on one ounce increments, are indifferent to whether a mailer uses one-quarter of that ounce, three-quarters of it, or the full ounce. the mailer pays for the fraction as if it were the whole. The monthly bill and the return envelope PG&E sends to its customers normally weighs not the full ounce but a fraction of it. So the question arises, what to do with the difference, the "extra" space?

PG&E currently uses this extra space to send its *Progress*, a shareholder-funded newsletter which, while pleasant and sometimes informative, is nonessential to the provision of safe and reliable utility services. TURN now asks that as a consumer organization it be permitted to periodically use the extra space to reach ratepayers who, if properly informed, might see fit to morally and/or financially support its efforts. In today's order, the majority reaffirms its earlier decision to grant TURN's request. I must dissent from this order. Some of my concerns were expressed in my earlier separate concurring opinion in this matter in which I dissented in part. I will reiterate them here

and, having had time to further reflect on this matter, present additional concerns which now lead me to fully dissent from the majority opinion.

In reviewing this case, I was struck by the similarities between it and the case of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), wherein the Supreme Court struck down a state statute which required newspapers to provide political candidates whom they had criticized an opportunity to respond to the criticism. Similar to the Court's concerns in that case, it is not altogether clear to me that TURN's use of the billing envelope to disseminate its literature is required as a matter of either necessity or right. Thus, I am persuaded that we should not infringe on PG&E's rights of free speech guaranteed to it by the First Amendment.

TURN has other opportunities to reach its natural audience. It may solicit support through its own mailings. Additionally, our rules regarding intervenor fees are frequently used to reward TURN's good efforts and, in fact, in another action today we award TURN $13,102 in attorney's fees for its contribution in a Commission rate case proceeding. I question, therefore, if TURN or any other party *needs* access to the billing envelope in order to be an effective participant in our proceedings. As to rights, TURN certainly cannot lay claim to any greater rights than any other ratepayer or consumer group that might request access to the billing envelope. Thus, I am concerned that this Commission not place itself in a predicament where it will be called upon to resolve disputes as to whom or when or how often a multitude of competing groups or ratepayers should be granted access to the billing envelope. And, of course, the Supreme Court has implied that some rights are held by the utility should it desire to use the extra space for its purposes. *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980).

As to the practical shortcomings of this order, I noted in my separate opinion to Decision 83-12-047 that it is incumbent upon

the majority to specify a precise and relatively simple method to resolve these sorts of disputes. Yet once again that necessity has been avoided by the majority. Also, in my opinion, granting TURN access to the PG&E billing envelope on eight occasions (four times per year for two years) is undue. A meaningful evaluation could take place with respect to a program of this nature within a year, yet the majority grants TURN use of the billing envelope for two full years. I have found both TURN and PG&E to be vigorous advocates and constant adversaries and I would not look forward to resolving additional unnecessary confrontations between them.

I point out here, that I found my concerns to be less compelling and urgent in Decision 83-04-020, *Center for Public Interest Law, et al. v. San Diego Gas and Electric Company*. The "UCAN" organization of that case is a ratepayer founded and comprised group with closer links to its constituency than is the case with TURN. That case was also void of the internecine rivalries between consumer groups with which I am concerned, a rivalry manifested in this case by the presence of the California Public Interest Research Group.

The Legislature has often expressed interest in the issue of public participation in Commission proceedings. Proposals for a consumer utility board comprised of ratepayers have been introduced by various legislators. I would be more inclined to support the majority if some express statutory provision addressed the request now before us. Instead, the majority essentially relies upon implicit authorities found in Public Utilities Code Section 701. I am not wholly convinced by their arguments. But, assuming that the majority is correct, having the authority to do something and deciding whether or when to exercise it are two separate questions. In this case and again assuming we have

authority in this matter, I would not exercise our jurisdiction. Therefore, I must respectfully dissent.

/s/ VICTOR CALVO
Victor Caivo, Commissioner

WILLIAM T. BAGLEY, Commissioner, Dissenting:

This is written to reiterate and emphasize one aspect of my prior dissent in this matter (see D.83-12-047, Dissent of W.T. Bagley). That dissent is attached hereto, incorporated by reference, and is made a part of this dissent to the final order issued by the Commission majority today. After acknowledging an understandable societal dilution of property rights over the years, that dissent stated at page 7:

> But here we deal with more than just a classical property right defense to some type of governmental action or constriction affecting property *per se*. Though certain 14th Amendment property rights have been diluted over the years *vis a vis* an owner's claimed right of usage of the property itself, it is submitted that property rights have never been and should never be eroded, and by judicial fiction transferred to others, in order to justify a governmental constriction on First Amendment principals of free speech. Therein lies a major distinction present in this case.

To restate this basic distinction, it is submitted that there is absolutely no precedent for, or constitutional basis of, a dilution and transfer of a person's property right in order to justify a restriction upon that person's right of free speech. Where a claimed property or governmental right conflicts with the First Amendment, the First Amendment prevails.

Conscious of the fact that the theory of an "equitable property right" in the envelope is illusory at best, the Commission majority now searches for an additional ground or rationale for its

decision. The majority would now, additionally, rely upon an omnibus powers section of the Public Utilities Code.[1]

The majority also would amend a statement made in a most objectionable footnote to the original opinion and order, by adding the thought that defendant PG&E "may use any of the extra space not used by TURN . . .".[2]

Indulging in further contortions, the majority now adds the following paragraph to its original decision at page 34:

> "In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious."

That last postulate immediately brings to mind the very recent U.S. Supreme Court decision, reversing the California Supreme Court, and saying that if there were a public trust to be imposed on the subject privately held lagoon, it should have been asserted during its inceptive years and not 130 years later. *Summa Corp. v. California Ex Rel. State Lands Commission et al*, 52 LW 4433 (April 17, 1984).

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[1] "The Commission may supervise and regulate every public utility in the State and may do all things whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (Section 701).

[2] See page 23 of the original opinion: "It is reasonable to assume that ratepayers will benefit more from exposure to a variety of views—we will require PG&E to give TURN access to the extra space in the billing envelope four times a year—PG&E will be permitted to continue to insert the Progress during the remaining months".

This is now modified by adding: "*and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted.*" (Emphasis added).

Putting that apt analogy aside, the basic fact remains that the shareholder's right, exercised at shareholder's expense, to use the company's envelope for a First Amendment-protected message is being curbed and transferred to others. And now under the revised order TURN can determine, solely by its choice of paper weight, whether or not and if so how much material may be inserted in the envelope by defendant's management on behalf of the shareholder. See footnote 2, *supra.* Under this order we have the unseemly situation where government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other. That, compared to government proscription, is deprivation squared.

It is of one genre to limit, for example, the size and nature of improvements on ocean and bay front property in order to preserve public view and enjoyment of our natural resources; it is quite another to order such property owner to organize public meetings on his or her view property (four times a year) for the benefit of extraneous interests and to *forbid* that owner from speaking at such gatherings if the other interests object. Literally, the free speech forum—the podium if you will—is being transferred from one party to another by this governmental decision.

The majority's basic problem is that it refuses to recognize that corporate entities are granted and continue to enjoy First Amendment rights. That is exemplified by its facade-like transfer of ownership of the forum, and likewise by its new reliance on Section 701. Just because the legislature grants to the PUC a broad set of powers over public utilities does not make those utilities any less the beneficiaries of First Amendment protections and does not make deprivation of speech rights anymore constitutional.

It is not inordinate to assume that government at some future time would assert additional authority over the newpaper industry, and the many corporate owners thereof. Gasoline rationing was a fact of life not too many years ago. Conceivably there may

come a day when we would face the necessity of paper or newsprint rationing in a monopolized, short supply industry. Congress could, constitutionally, declare suppliers and even a limited number of distributors to be "Public Utilities". But neither Congress nor the Legislature—nor the designated regulatory body—could instruct the corporate newspaper owner to use or not use fuel in pursuit of a given story, nor could the newspaper supplier be ordered to limit its sales to certain desirable news usages, even though those suppliers were legally denominated "monopoly public utitlites" and placed under a statute comparable to Section 701.

In its verve to support "consumer rights", this majority has run rough-shod over basic constitutional rights of free speech—and without giving thought to logical extensions of its act. Would it extend its free speech constrictions to other corporate entities which might be regulated in the future just because they are regulated. And who, after TURN gets its chance, will next be able to control this defendant's right to speak. In the context of the First Amendment, this is a very illiberal decision by a majority who would seek to liberalize consumers rights at the expense of the right of Free Speech. I would remind the majority that in the past other seeming Democratic societies, on a larger scale, have followed a similar path. They are no longer Democratic societies.

/s/ WILLIAM T. BAGLEY
William T. Bagley, Commissioner

May 2, 1984
San Francisco, California

Appendix B

Cal. Const. art XII, § 6, provides:

> "The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction."

Cal. Const. art. XII, § 5, provides:

> "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain."

Cal. Pub. Util. Code § 701 provides:

> "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Cal. Pub. Util. Code § 728 provides in pertinent part:

> "Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force."

Cal. Pub. Util. Code § 729 provides:

"The commission may, upon a hearing, investigate a single rate, classification, rule, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, classifications, rules, contracts, and practices, or any thereof, of any public utility, and may establish new rates, classifications, rules, contracts, or practices or schedule or schedules in lieu thereof."

Cal. Pub. Util. Code § 761 provides:

"Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules."

Cal. Pub. Util. Code § 762 provides in pertinent part:

"Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or

changes be made or such structures be erected in the manner and within the time specified in the order."

Cal. Pub. Util. Code § 1709 provides:

"In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

No. 84-1044

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

VS.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION, CONSUMERS UNION,
CONSUMERS FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal From The Supreme Court Of California

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

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On Appeal From The Supreme Court Of California

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant, Pacific Gas and Electric Company (PGandE), hereby submits its brief in opposition to the motions to dismiss filed by the Public Utilities Commission of the State of California ("commission") and by Toward Utility Rate Normalization, Consumer Federation of California, Common Cause of California and California Public Interest Research Group, (collectively referred to hereinafter as "TURN").

Both TURN and the commission miss the point of this appeal. This appeal is not, as TURN argues, about a "threat of injury to Appellant" because PGandE may have "to pay additional postage if it wishes to communicate with its customers." (TURN's M.D., p. 3.) Rather, it raises the important national issue of whether a state may order a privately-owned public utility to publish in its monthly billing envelope, the fund solicitation messages of a third party. Nor does this appeal depend upon who owns the extra space.[1] For as stated by appellant in the Jurisdictional Statement,

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[1] TURN, citing *People* v. *Western Airlines, Inc.* 42 Cal.2d 621, 630, 268 P.2d 723, 728 (1954), argues that "it is settled law in California that the denial of a petition for review, even without opinion, is a decision on the merits both as to the law and the facts presented in the review proceedings." (TURN's M.D., p. 2, n. 3.) However, fifteen (15) years after *Western* was decided, the California Supreme Court, in *Consumer Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 160 Cal.Rptr. 124, 603 P.2d 41, (1979) explained that "when the issue is a question of law rather than of fact, the prior determination [of the commission] is not conclusive either if injustice would result or if the public interest requires that litigation not be foreclosed." (25 Cal.3d at 902, 160 Cal.Rptr. at 130, 603 P.2d at 47.)

Although not relevant to this appeal, both TURN and the commission, nevertheless, argue that the issue of ownership of the extra space is res judicata. (See TURN's M.D., pp. 2, 18-24; Commission's M.D., pp. 8-14.) Their arguments, however, are without substance. In Decision No. 93887 (J.S., app., p. 63), a general rate case, the commission, discussing possible PURPA violations, stated that "the extra space surely has economic value." (J.S. app., p. 67.) It then stated that because the extra space has economic value, it is the property of the ratepayers. The commission's discussion of the extra space ownership

"Regardless how the ownership of that extra space is defined, the Commission's regulation of what goes into appellant's envelope must still meet constitutional standards." (J.S., p. 21.)

Appellees' confusion is due primarily to their characterization of the extra space as space that exists in a vacuum separate and apart from the billing envelope itself which the commission has acknowledged belongs to PGandE. (Dec. No. 83-12-047, slip op., at pp. 4-5 (Cal. PUC, Dec. 20, 1983); J.S. app., pp. 2-3.) The extra space cannot be utilized by TURN without a physical invasion of PGandE's envelope.[2] It is the actual physical occupation by TURN of appellant's envelope that is at issue.

TURN and the commission argue that, merely because the mailing cost is a component in setting rates, the commission is, therefore, at liberty to order that TURN's messages be inserted in appellant's envelope. Their position cannot withstand First Amendment scrutiny. (See J.S., pp. 18-22.) The commission's

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was to explain that an economic value could be assessed to that space. That discussion was only incidental to its ultimate decision granting a rate increase.

Later the commission explained that the extra space language in Decision No. 93887 was a "concept . . . created by the commission for analytical convenience." (Commission's Answer, Cal. Supreme Ct., S.F. No. 24734, p. 27 (7/9/84).) It also explained that "there is considerable doubt whether the extra space is property at all." (*Id.*) Thus, the ownership of the extra space was not necessary for the commission to assess an economic value in Decision No. 93887; and, therefore, the doctrine of collateral estoppel was inapplicable. Because, as stated in *People v. Lyons*, 58 Cal.App.3d 86, 88, 129 Cal.Rptr. 759, 760 (1976), "In order for a finding or other determination of an issue in one action to result in the application of the doctrine of collateral estoppel in a second action, that finding must have been necessary to the judgment in the first action."

[2] If the economic value of the extra space is what the commission wants to recoup, a physical invasion is the most obnoxious and unreasonable way to achieve that goal. Assessing an economic value and charging appellant for the value of that space would be the least restrictive method to achieve its goal.

order ignores the First Amendment's intent "to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hopes that the use of such freedom would ultimately produce a more capable citizenry and more perfect policy . . . ." (*Cohen v. California*, 403 U.S. 15, 24 (1971).)

ARGUMENT

I

THE ARGUMENT THAT THIS APPEAL IS BASED ON APPELLANT'S DESIRE TO AVOID PAYING THE EXPENSES OF ITS MAILINGS IS NOT SUPPORTED BY THE RECORD BELOW.

TURN's argument that "Appellant . . . brings this case to the Court on the basis of a factual record which simply fails to support its contention that it will be unable to insert *Progress* into the billing envelope without paying additional expense" (TURN's M.D., p. 7) misstates appellant's position. There is no claim by appellant that it is entitled to a "free ride" in the billing envelope.[3] This subsidization argument was answered in the proceedings below where appellant stated, "if forced subsidization is indeed the evil sought to be remedied, then assessing a reasonable value for the use of that [extra space] would remedy the problem . . . ."[4] (*Reply Brief, supra*, S.F. No. 24734 at p. 15, n. 8).

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[3] In its *Reply Brief In Support of Petition For The Writ of Review of Pacific Gas and Electric Company*, S.F. No. 24734, (8/3/84), appellant specifically stated: "There is nothing in the record . . . which indicates the commission cannot make a reasonable allocation of cost for the extra space. Such allocations occur routinely in utility ratemaking." (*Id.*, p. 14.)

[4] TURN's assertion that "the decision below was intended to remedy a prior and (sic) (and final) determination that Appellant had violated federal law by recouping some of the costs for its political advertising from ratepayers, in violation of a PURPA standard" (TURN's M.D., p. 28) is not supported by the decision below.

II

TURN'S ARGUMENT THAT THIS APPEAL IS INSUBSTANTIAL HAS NO MERIT.

A. Appellant's Claims Are Ripe For Review And TURN'S Argument That Temporary Violations Of Protected Rights Do Not Violate The First Amendment Is Unsupported.

First Amendment protections do not hinge upon the length of time one's protected rights are violated. TURN's arguments that this case is not ripe for review and that the commission's access order is constitutional merely because it is limited to a "two-year period" (TURN, M.D., p. 25) are unsupportable. Simply put, TURN's argument is that since appellant's constitutional rights will be violated for only two years, those rights need not be protected. Such an argument fails to recognize that a major purpose of the First Amendment is "to protect . . . free discussion" (*Mills v. Alabama*, 384 U.S. 214, 218 (1966)) and not to limit discussion even on an experimental or temporary basis.

Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981), upon which TURN relies for its ripeness argument, is inapplicable. First, *Hodel* does not deal with a First Amendment claim. Second, the *Hodel* Court was clear in its holding that the lack of ripeness there was based on appellees' failure to exhaust their administrative remedies since they had failed to avail "themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance . . . or a waiver from the surface mining restrictions. . . ." (*Id.*, p. 297.)

Unlike the appellees in *Hodel*, appellant here has exhausted every possible administrative remedy; and this Court is the last possible forum where its First Amendment claims may be reviewed. The request for a two-year experiment abridging appellant's First Amendment rights is inconsistent with this Court's pronouncement that, "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." (*Cohen v. California*, *supra*, 403 U.S. at 24; see also, *Thornhill v.*

Alabama, 310 U.S. 88, 95-96 (1940); *Thomas v. Collins*, 323 U.S. 516, 537 (1945).)

B. The Decision Below Does Conflict With Decisions From Other States.

The constitutional issues raised by this appeal not only remain unresolved, but are in a state of conflict throughout the nation. (See *Brief of Edison Electric Institute As Amicus Curiae In Support of The Jurisdictional Statement*, pp. 4-7.) TURN's claim that the decision below is insubstantial because it does not conflict with any judicial decisions is misleading. (TURN's M.D., p. 27.) Although the California Supreme Court's refusal to review the commission's decision is considered, for appeal purposes, as a decision of the California Supreme Court (see J.S. p. 2), the fact remains, however, that the commission's decision does, indeed, conflict with other commission decisions across the nation. For example, it is in direct conflict with a decision of the Vermont Public Service Board. In *Vermont Public Interest Research Group, Inc. v. Central Vermont Public Corporation*, 39 PUR 4th 59 (1981), the Vermont Public Service Board was requested to provide a right of access to the utility billing envelope. In rejecting a right of access, Vermont held that:

> "Not only would a right of access policy in respect of the utility billing process inevitably curtail the very freedoms that petitioners assert would be enhanced, the administration of a right of access policy would be simply impractical. Parceling out the right to use the utility bill among every would-be pamphleteer and politician would be, *as a practical matter, impossible, subjecting the board to charges of favoritism and exposing it to endless litigation.*" (*Id.*, p. 72.) (emphasis added.)

Vermont rejected the proposition, adopted by the California commission, that consumers "will benefit more from exposure to a wide variety of views than they will from only that of PGandE." (Dec. No. 83-12-047, slip op., at p. 28; J.S., app., p. 21.) The Vermont Board observed that:

> Underlying all of petitioners' arguments is the assumption that government has an obligation to ensure that a wide variety of views reach the public and that all ideas should be guaranteed by the government of (sic) equal access to the "marketplace of ideas." While the First and Fourteenth Amendments ban government from interfering in any way with free speech or press, government is not required to ensure that all ideas have equal standing. *The First Amendment, rather than justifying a government imposed obligation to publish, protects individuals and corporations from being compelled by the government to publish that which they do not wish to publish. Vermont PIRG v. Central Vermont Public Service Board, supra,* 39 PUR 4th, at pp. 72-73. (emphasis added.)

Obviously, there are conflicting decisions on the identical issues raised by the Jurisdictional Statement. (See also, *Brief of American Gas Association As Amicus Curiae In Support of Appellant's Jurisdictional Statement* p. 2, n.2 and the conflicting cases cited therein.)

III

THE COMMISSION'S CLAIM THAT IT HAS UNLIMITED POWER TO REGULATE UTILITIES IS UNFOUNDED.

According to the commission, "Under its broad state constitutional and statutory mandate, the commission may do all things 'necessary and convenient' to the exercise of its regulatory power. . . ." (Commission's M.D., p. 10.) But, California Public Utilities Code Section 701, cited as authority, does not grant the commission power to regulate the content of appellant's billing envelope.[5] Any power or jurisdiction claimed pursuant to section 701 must not only be "cognate and germane" to the regulation of

[5] It should also be noted that TURN's argument (TURN's M.D., pp. 18-19) that the commission may determine property rights in the billing envelope is contrary to law. The commission derives its power from Article XII, section 1 through 9 of the California Constitution, and from the powers delegated it by the Legislature. Nothing in either the constitution or the statute vests the commission with jurisdiction to

the utility, but also must be consistent with the First Amendment.[6] *(Southern California Gas Company v. Public Utilities Commission,*[7] 24 Cal.3d 653, 156 Cal.Rptr. 733, 596 P.2d 1149 (1979); see also *Consumer Lobby Against Monopolies v. Public*

decide ownership of property except in certain eminent domain proceedings that have been properly filed with the commission seeking to condemn utility property. (See Cal. Pub. Util. Code § 1401, et. seq.; Cf. *East Bay Municipal District v. Railroad Commission*, 194 Cal. 603, 614-616 (1924).)

[6] In *Huntley v. Public Utilities Commission*, 69 Cal.2d 67, 69 Cal.Rptr. 605, 442 P.2d 685 (1968), the California Supreme Court explained the conditions under which the commission may permissibly regulate speech:

> The commission correctly asserts that freedom of speech is not absolute. *However, to justify any impairment, there must be present "compelling state interest . . . [which] justifies the substantial infringement of appellant's First Amendment right.* It is basic that *no showing merely of a rational interest would suffice;* in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation, [citation].'" (*Sherbert v. Verner,* 374 U.S. 398, 406-407 [10 L.Ed.2d 965, 971-972, 83 S.Ct. 1790].) (69 Cal.2d at 74, 69 Cal.Rptr. at 609, 442 P.2d at 689.)

[7] In this case, the court annulled an order of the commission compelling Southern California Gas Company to institute a home insulation financing program. The Legislature had enacted a Home Insulation Assistance and Financing Act which *permitted* utilities to engage in insulation financing. Citing California Public Utilities Code sections 701 and 702, the commission argued that it had general authority under sections 701 and 702 to mandate the financing program. Disagreeing with the commission, that court observed:

> The Legislature's express decision to enact a permissive program cannot reasonably be interpreted to have included an intent to allow the commission to institute mandatory programs under the general provisions of sections 701 and 702. . . . Accordingly, we conclude that the commission lacks the authority to require the implementation of an insulation financing assistance program. (*Southern California Gas Company, supra,* 24 Cal.3d at 659, 156 Cal.Rptr. at 736, 596 P.2d at 1152.)

Utilities Commission, 25 Cal.3d 891, 160 Cal.Rptr. 124, 603 P.2d 41 (1979); and *Southern California Gas Company v. Public Utilities Commission*, S.F. 24603 et. al., slip op., at p. 5 (Cal. Supreme Ct., Feb. 25, 1985) ("... [S]ection 701 implies no regulatory authority to award fees and participation costs.").)

IV

EVEN IF THE COMMISSION HAS AUTHORITY TO ORDER A UTILITY TO COMMUNICATE CERTAIN NOTICES TO CUSTOMERS, THAT AUTHORITY DOES NOT AUTHORIZE THE COMMISSION TO COMPEL APPELLANT TO PUBLISH THIRD-PARTY SOLICITATIONS.

Not one of the cases cited by the commission supports its argument. For several reasons, the commission's position is untenable.[8]

First, its reliance upon this Court's decision in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), to support its conclusion that "the utility billing envelope provides a 'unique forum for expression'" (Commission's M.D., p. 11) is totally misplaced. *Metromedia* did not relate to a utility's billing envelope. The issue in *Metromedia* was whether the City of San Diego could, consistent with the Constitution, place substantial restrictions on the erection of outdoor advertising. This Court, reversing the California Supreme Court, held that the city's ordinance was "unconstitutional on its face." (453 U.S. at 521.)

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[8] The commission misses the point with its argument that it may order appellant to "provide information as to procedures for disputing the accuracy of the bill ... notice of commission proceedings, notice of rate, billing or other service charges." (Commission's M.D., p. 11.) Even if appellant has published the above commission notices in the past, this fact does not empower the commission to order appellant to publish TURN's fund raising messages. Fund solicitation notices are not similar to commission notices or inserts informing customers of matters relating to their rates and service.

Second, the commission's reliance on *Campbell Telephone Co.,* 27 Cal. R.R.C. 251 (1925) is misplaced because that 1925 decision did not order a utility to communicate the message of a party not regulated by the commission. Rather, it related only to establishing the most cost effective way to bill a customer for service when two regulated utilities render similar services to the same subscriber.

Third, the other cases relied on by the commission are equally inapplicable. For example, it cites *Pacific Gas and Electric Co.,* 17 Cal. R.R.C. 143 (1919); *Packard v. Pacific Telephone and Telegraph Co.,* 71 Cal. P.U.C. 469 (1970); *Welch v. Pacific Telephone and Telegraph Co.,* 72 Cal. P.U.C. 74 (1971) and *United States v. Western Electric Co.,* 578 F.Supp. 668 (D. D.C. 1983) as support for its decision. But, none of these cases either supports the commission's argument or involves the commission's authority to force a utility to carry the message of a third party.

Even if the cases cited stood for the untenable proposition for which they were cited, they still would not be precedent for resolving the issues raised by this appeal. The commission's argument, reduced to its essence, says that since it has violated appellant's protected rights in the past, it may now continue to do so because appellant has waived its First Amendment protection. Such an argument is contrary to the First Amendment. (*Thornhill v. Alabama,* 310 U.S. 88 (1940).)

V

THE DECISION BELOW IS NOT A PERMISSIBLE REGULATION OF A NONPUBLIC FORUM.

The commission's argument that its decision is permissible as a regulation of a nonpublic forum (Commission's M.D., p. 20) is without legal support. And, *Perry Educational Association v. Perry Local Educators Ass'n,* 460 U.S. 37 (1983), cited by the commission as authority for this proposition lends no support. Mr. Justice White, writing for the Court, distinguished the grant of access in *Perry,* which involved government property, from the

right of access to a utility's billing envelope. "Indeed, in *Consolidated Edison,* [*Consolidated Edison Co v. Public Service Commission,* 447 U.S. 530 (1980)] which concerned a utility's right to use its own billing envelopes for speech purposes, the Court expressly distinguished our public forum cases, stating that '*the special interest of a government in overseeing the use of its property' were not implicated.*" (460 U.S. at 49, n. 9.) (emphasis added.) Here, TURN seeks not to utilize government property, but rather that of a private property owner. Thus, *Perry* is of no avail.

VI

CONCLUSION

Beyond question, this case raises substantial national issues of first impression involving not only the fundamental constitutional rights of appellant, but also of numerous other similarly situated parties as indicated by the numerous amici curiae briefs filed from throughout the nation in support of the Jurisdictional Statement. The Court should deny the motions to dismiss, note probable jurisdiction and grant plenary consideration of this appeal.

Dated: March 19, 1985

Respectfully submitted,

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No. 84-1044

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY, a California corporation,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Supreme Court of the State of California

BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE, AMICUS CURIAE, IN SUPPORT OF JURISDICTIONAL STATEMENT

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BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE, AMICUS CURIAE, IN SUPPORT OF JURISDICTIONAL STATEMENT

INTEREST OF THE AMICUS CURIAE

The California Chamber of Commerce ("The Chamber") submits this brief in support of the Jurisdictional Statement filed by Pacific Gas and Electric Company ("PGandE"). All parties have consented.

The Chamber is a voluntary, nonprofit, California-wide business association, with more than 4,800 members from virtually every industry and geographic section in the state. Ninety percent are small or medium-size businesses. The Chamber's membership also includes 150 trade associations, and it is affiliated with and regularly communicates on current business issues with 387 local and regional chambers of commerce and more than 167,000 small businesses. The Chamber estimates that its members and affiliated local chambers employ 75 percent of the private sector work force in California.

The Chamber (a) advises its members of state and federal legislative and judicial developments; (b) appears for its members before local, state and federal legislative bodies; (c) sponsors educational seminars and commissions publications to inform its members of their obligations under the law; and (d) initiates legal proceedings to protect the interests of its members.

The Chamber, on behalf of its members and affiliates, is vitally interested in the issues involved in this case. The decision of the California Public Utilities Commission ("Commission") poses a threat to fundamental rights of property and expression. Accordingly, The Chamber respectfully urges the Court to note probable jurisdiction.

SUMMARY OF ARGUMENT

The Commission's decision prevents PGandE from using its billing envelopes to communicate with its customers. This vio-

lates PGandE's First Amendment right to speak. Consolidated Edison Co. v. Public Srv. Comm'n., 447 U.S. 530 (1980); Central Hudson Gas & Electric Corp. v. Public Srv. Comm'n, 447 U.S. 557 (1980).

The restriction cannot be justified as a narrowly tailored means of serving a compelling state interest. First, the state interest the Commission identifies, increasing consumer participation in Commission proceedings, is simply not a compelling interest. Second, the means chosen to serve that interest are only indirectly related to it, and there are superior alternatives which the Commission did not consider.

The Commission's decision is not a reasonable time, place or manner restriction either. The decision does not restrict PGandE's speech because its time, place or manner is disorderly or invades the rights of others. Rather, the decision restricts

PGandE's speech so that it can be replaced in the same time, place and manner by the speech of others who will express different opinions. That is content regulation, not time, place or manner regulation, and it violates the First Amendment.

The Commission's decision also forces PGandE to publish the opinions of its adversary with which it disagrees. This is a plain violation of PGandE's right not to speak. Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

Finally, the Commission's decision cannot be justified on any theory that PGandE's ratepayers, rather than PGandE itself, own the billing envelope space. Ratepayers pay for and receive service; they do not also acquire an ownership or equity interest in the utility's property. Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23 (1926).

ARGUMENT

I. The Commission's Decision Abridges PGandE's First Amendment Rights

The Commission's decision restricts PGandE's right to mail its newsletter, Progress, to its customers, as PGandE has done for 60 years. The decision also forces PGandE to send to its customers messages prepared by its adversary. This order violates PGandE's First Amendment rights.

A. The Decision Violates PGandE's Right to Free Speech

1. The Order Is Not a Narrowly Tailored Means Of Serving a Compelling State Interest

This Court's decision in Consolidated Edison Co. v. Public Srv. Comm'n., 447 U.S. 530 (1980) is a square holding that a state may not constitutionally prevent a public utility from using its billing envelopes to communicate with its customers. This decision is dispositive, and sets the standard by which the Commission's order must be judged:

> Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.

Id. at 540. The Commission cannot show either a "compelling state interest" or that its order is a "precisely drawn means."

The Commission says the state interest "is the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." (Dec. 83-12-047, p. 29, App., p. 22, quoting Dec. 83-04-020, p. 17, App., p. 103)1/ In other words, the Commission wants to enhance consumer information and power vis-a-vis PGandE. The Commission does not explain why that is a compelling interest that can override free

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1/ Citations are to both the slip opinions and to the appendix to the Jurisdictional Statement.

speech, and it is not. In Buckley v. Valeo, 424 U.S. 1 (1976) the Court found the state interest in balancing political power to be insufficient to justify restrictions on campaign expenditures, and said

> But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .

Id. at 48-49. That is directly applicable here. The Commission offers no answer to it.

Nor is the Commission's means of achieving its goal carefully tailored. The Commission asserts that a "shared approach to use of the extra space," (Dec. 83-12-047, p. 30, App., p. 22) constitutes a sufficiently narrow regulation, but that is simply an unsupported conclusion. In fact, publication of TURN's messages may well not increase consumer participation in Commission proceedings. Therefore, the Commission's order is defective because it does not "directly advance the

state interest involved." Central Hudson Gas & Electric Corp. v. Public Srv. Comm'n, above, 447 U.S. at 564.

Moreover, there are obvious superior alternative means of increasing consumer participation in regulatory proceedings that do not entail any restrictions on utility speech.2/ The Commission's decision does not even consider them. Therefore, the decision's "restrictions are excessive and cannot survive." Id. at 564-66.

2. The Order Is Not a Reasonable Time, Place or Manner Restriction

Consolidated Edison embraced an alternative test which the Commission claims justifies its order. The Court "recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample

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2/ For example, allowing attorneys' and intervenors' fees to consumers who intervene and participate in regulatory proceedings.

alternative channels for communication." Consolidated Edison, 447 U.S. at 535. However, a valid time, place, or manner restriction may not be based upon the content or subject matter of the speech. (Id. at 536): As the Court said:

> [T]he essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares at 2 a.m. disturbs neighborhood tranquility.

Id. (emphasis added).

Thus, time, place or manner restrictions on the method of speech have been permitted in a few well-defined circumstances where necessary to protect against "substantial disorder or invasion of the rights of others."3/ No case has held that the time,

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3/ Tinker v. Des Moines School Dist., 393 U.S. 503, 513 (1969) (school may not punish students for wearing black protest armbands). See also Grayned v. City of

(Footnote 3 continued on page 10)

place or manner doctrine may be used offensively, as here, to give another party a right it would not otherwise have.

Moreover, the Commission's order fails to satisfy the requirement that time, place, or manner regulations be "applicable to all speech irrespective of content." Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975). The Commission's claim that its decision "is neutral as to content of the parties messages" (Dec. 83-12-047, p. 28, App., p. 21), is not true. It has substituted consumer messages for utility viewpoints precisely because it anticipates the

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(Footnote 3 continued from page 9)

Rockford, 408 U.S. 104, 118 (1972) (anti-noise regulation to maintain order of education facility constitutional); United States v. O'Brien, 391 U.S. 367, 377 (1968) (statute prohibiting destruction of draft card is constitutional); Cox v. Louisiana, 379 U.S. 536, 554 (1965) (licensing requirement for parades to regulate traffic constitutional).

content will be different. (Dec. 83-12-047, pp. 21-23, App., pp. 16-17) The Commission is allowing TURN to speak in the very same time, place and manner that it is not allowing PGandE to speak, and is restricting "expression because of its message, its ideas, its subject matter, or its content." Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Thus, the Commission's "own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation." Consolidated Edison, above, 447 U.S. at 537.

B. The Decision Violates PGandE's Right to Refrain from Speaking

The Commission acknowledges that Wooley v. Maynard, 430 U.S. 705 (1977) and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) stand "for the clear proposition that the First Amendment right to free speech also includes the right to refrain from speaking and the right not to be com-

pelled by government to publish that which one does not wish to publish." (Dec. 83-12-047, p. 30, App., p. 23) The Commission's sole response is as follows:

> This argument . . . assumes that we are asking PGandE to publish the messages of TURN or others. In fact . . . we are simply ordering PGandE, which has physical control over the billing space, to make it available for the benefit of ratepayers. We are not asking PGandE to publish anything as its own.

(Dec. 83-12-047, p. 30, App., p. 23, as modified by Dec. 84-05-039, p. 8, App., p. 51)

What this means is not clear. If it means that PGandE has no First Amendment interest because it does not own the space in the envelopes, it is simply wrong. (Section II, below)

If it means that requiring PGandE simply to mail TURN's materials to customers does not force it to "publish" anything, it makes the First Amendment meaningless. The point of the First Amendment in this application is that a person may not be forced actively

to assist in the dissemination of the opinions of others. That is precisely what the Commission's decision does to PGandE, and it is precisely what Miami Herald and Wooley forbid.

Finally, if the Commission means that its order is proper because PGandE is not required to publish TURN's opinions as its own, it again misses the point of Miami Herald and Wooley. The concern in those cases was not that anyone was required to misrepresent his own opinions by publishing someone else's views as his own.4/ The concern in Wooley was with requiring a person "to participate in the dissemination of an ideological message" and to become "the courier for such message," 430 U.S. at 713,

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4/ In Miami Herald the statute required publication of replies to the publisher's own materials. No one would have thought the newspaper was the source. In Wooley, the message was to appear on every license plate in the state. Again, it was obvious that the message was not that of each car owner.

717. In Miami Herald, the concern was with compelling publication of material that editors and publishers do not wish to publish, thereby interfering with their editorial judgment as to the size and content of the publication. 418 U.S.at 258. Those same concerns are present here; the Commission does not even mention them. Its decision violates the First Amendment.

II. The Decision Cannot Be Justified On The Theory That Ratepayers Own The Space In PGandE's Billing Envelopes

The Commission reasons that since the cost of mailing bills is recovered in PGandE's rates, any "extra space" in the envelopes is ratepayer property. (Dec. 93887, p. 220, App., p. 72) Then, "since that [extra billing envelope] space is not the property of PGandE in the first place, it has no right to use the space for First Amendment purposes." (Dec. 83-12-047, p. 30, App., p. 22) This is dead wrong.

A. Ratepayers Do Not Own the Space in the Billing Envelopes

The ratepayers do not "own" PGandE's billing envelopes or the "extra space" in them or any of the property a utility acquires with revenues from rates. Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23 (1926) is directly on point. In holding that the ratepayers were not entitled to the benefit of an admittedly excessive depreciation reserve, the Court said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stock.

271 U.S. at 32. The Court has never deviated from this principle. Indeed, in Consolidated Edison Co. v. Public Serv. Comm'n,

above, 447 U.S. at 540, the Court held that the State could not prevent the utility from utilizing "its own billing envelopes to promulgate its views on controversial issues of public policy." Id. at 540. (emphasis added)

The Commission's decision cannot be reconciled with these decisions or with their controlling principle.

B. The Decision Is Insupportable

The Commission's decision is without any coherent principle and its premise is factually incorrect. The Commission seems to be as much concerned that PGandE not benefit from any extra space as it is that the ratepayers do benefit from it, for it supports its holding by arguing that PGandE would be unjustly enriched if it were permitted to use the "opportunity" value of the extra space. (Dec. 93887, pp. 159b-59c, 220-20a, App. pp. 67-68, 72; Dec. 83-12-047, pp. 4-5, 34-35, App., pp. 3, 27; Dec. 84-05-039,

pp. 2-3, App. p. 46) Indeed, the Commission sometimes concedes that the extra space is not really ratepayer "property", saying instead that the ratepayers have an "equity right." (Dec. 83-04-020, p. 14, App., p. 100; Dec. 83-12-047, pp. 5-6, App., p. 4)

The Commission's incomprehensible rationale is only one of the problems with its attempt to redefine the basic relationship between PGandE and its ratepayers. There are many others, and the Commission does not come to grips with any of them.

First, the Commission focuses on only one item of PGandE's total costs and revenues. How is PGandE unjustly enriched if its overall rate of return is just and reasonable?

Second, the Commission's conclusion that ratepayers bear the cost of mailing the billing envelopes is based upon projected rather than actual costs. The ratepayers

don't <u>actually</u> pay for the "extra" space because the true mailing costs exceed projections. (Dec. 83-12-047, pp. 12-13, App., p. 9) Thus, the Commission's analysis is a purely theoretical construct, and its premise is contrary to fact.

Third, although the Commission acknowledges that PGandE's <u>Progress</u> contains information of value to the ratepayers (Dec. 93887, p. 159e, App., p. 69), it merely alludes to this other side of the ledger (<u>Id.</u>), without giving PGandE any credit for this value that it provides the ratepayers free of charge. (<u>Id.</u> at 159a, App. p. 66)

Fourth, if inclusion of mailing costs in rates makes the extra envelope space belong to the ratepayers, does everything else paid for from rates also belong to them? Virtually all of a utility's physical property has "extra" potential economic value at least as advertising space. And are rate-

payers entitled to use the after-hours "extra" capacity of utility offices and vehicles?

Fifth, does this "equity right", whatever it is, apply to unregulated business activities as well? If any firm's charge to its customers recovers the cost of billing or other handling, and that charge contains an "extra value," do the customers own the extra value or have an "equity right" in it?

The Commission's confused decision is a radical departure from established principles. This Court should review it to restore order to this important area of the law.

CONCLUSION

The Commission's action in this case strikes at the heart of fundamental First

Amendment values. This Court should note probable jurisdiction and reverse it.

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January 23, 1985.

CERTIFICATE OF SERVICE BY MAIL

JOHN R. REESE certifies:

1. That his name is John R. Reese and he is counsel of record for The California Chamber of Commerce, and that he is a member of the Bar of the Supreme Court of the United States.

2. That on January 23, 1985, he served all parties required to be served by placing 3 copies of the foregoing BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE, AMICUS CURIAE, IN SUPPORT OF JURISDICTIONAL STATEMENT in envelopes and depositing them in the United States mail, with first-class postage fully prepaid, at San Francisco, California to:

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No. 84-1044

IN THE

Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. AS *AMICUS CURIAE*

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BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AS *AMICUS CURIAE*

Consolidated Edison Company of New York, Inc. ("Con Edison"), with consent of all parties, files this brief as *amicus curiae* urging that the Court note probable jurisdiction, and, after plenary consideration, reverse the judgment of the Supreme Court of the State of California. The Pacific Gas and Electric ("PGandE") case is of critical concern to Con Edison because Con Edison has brought a case in the New York State courts challenging an order of the Public Service Commission of the State of New York (the "New York Commission") on constitutional claims identical to those ruled on by the California court.

Interest of *Amicus Curiae*

Con Edison is an investor-owned utility that provides gas, electric, and steam service in various parts of New York City and Westchester County in New York State. As a public utility, Con Edison is subject to the regulation of the New York Commission in conducting its utility business.

On May 14, 1984, the New York Commission issued an order announcing that it would require New York State utilities such as Con Edison to send printed messages from consumer groups called Citizens' Utility Boards ("CUBs") in the utilities' billing envelopes as soon as an application for access from a qualifying CUB is received. Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes, issued May 14, 1984, in N.Y. P.S.C. Case 28655, attached to Jurisdictional Statement as Appendix I. An application for access from a CUB is currently pending before the New York Commission. Con Edison, with two other New York State utilities,[1] filed suit against the New York Commission asserting that the Commission's order violates the utilities' First and Fifth Amendment rights under the United States Constitution,[2] and argued their case before the New York Supreme Court, Special Term, on January 4, 1985.

The New York Commission's order is substantially similar to the order of the California Public Utilities Commission (the "California Commission") that was affirmed by the California Supreme Court and is at issue in this proceeding. The orders of both commissions require that the utilities in question include

1. Continental Telephone Company of New York, Inc. and New York State Electric & Gas Corporation.

2. On November 14, 1984, the New York Commission issued an order denying petitions for rehearing that had been brought by various parties other than Con Edison to challenge the Commission's order. Order Denying Petitions For Rehearing, issued November 14, 1984, in N.Y. P.S.C. Case 28655. The utility companies that requested rehearing have also sought judicial review of the Commission's order in the New York courts.

messages from organizations representing ratepayer interests in the envelopes the utilities use to send bills to customers. While the specific terms of the orders vary, the constitutional issues raised by the circumstances of each case are the same.

The actions of the New York Commission and of the California Commission call into question fundamental concepts concerning the nature of a utility's private property and its right to free speech. Both commissions would appropriate the utilities' private property, their billing envelopes and the postage used to send them, without compensation, to further the cause of organizations with interests adverse to those of the utilities. In addition, both commissions would force the utilities to use their own property to convey third-party messages with which they disagree.

Although there is no judicial opinion in the California courts because of the California Supreme Court's summary affirmation of the California Commission's order, Con Edison believes that the briefs of the parties will permit a full review of the important constitutional question presented by this appeal. If the Court declines to review the decision of the California Court, the First Amendment issues involved in both the California and the New York cases will be resolved without the benefit of a full judicial analysis. The issues raised by the actions of the California and the New York Commissions are of vital concern to the entire investor-owned utility industry and are worthy of full judicial consideration before ultimate decision.

Rather than repeat the arguments made by PGandE in its Jurisdictional Statement on the First Amendment issues, in the remainder of this brief Con Edison will only expand on certain issues touched on by PGandE.

ARGUMENT:
A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED AND SHOULD BE FULLY HEARD BY THIS COURT.

I.

THE CALIFORNIA COURT'S DECISION DEPRIVES PGandE OF ITS RIGHT TO FREE SPEECH GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. PGandE Is The Sole Owner Of Its Billing Envelopes And The Space Within Them.

PGandE correctly points out in its Jurisdictional Statement that PGandE is the sole owner both of its billing envelopes and all the space within the envelopes. Jurisdictional Statement, pp. 20-21. This Court made clear in *Consolidated Edison Co. of New York* v. *Public Service Commission,* 447 U.S. 530 (1980), that a utility's billing envelopes belong only to the utility. In that case, the Court struck down an order of the New York Commission that prevented New York utilities from including bill inserts on controversial subjects in their billing envelopes. The Court, in distinguishing cases involving rights of access to *public* facilities, stated that Con Edison (*id.* at 540):

> "seeks merely to utilize its *own* billing envelopes to promulgate its views on controversial issues of public policy."[3] (Emphasis supplied).

The holding in *Consolidated Edison* is consistent with the well-established rule that the property a utility uses in rendering service to its customers belongs solely to the utility. The cases

3. In his dissenting opinion in *Consolidated Edison,* Justice Blackmun suggested that the States might redefine property rights so as to take ownership from the utility companies and give it to the ratepayers. 447 U.S. at 556. It is not clear whether Justice Blackmun intended to suggest that such a redefinition could be effected by administrative fiat, rather than by legislative act accompanied by a provision for just compensation. In any event, his dissent on this point was not supported by any of the other Justices.

cited by PGandE establish that utility customers do not acquire an interest in the utility's property by purchasing service from the utility.

B. The Action Of The California Commission Is Not Ideologically Neutral.

In *Wooley* v. *Maynard,* 430 U.S. 705 (1977), this Court ruled that a state cannot force an individual to use his private property for the display of an ideological message dictated by the state unless there is a compelling state interest and that interest cannot be served by means less restrictive of First Amendment rights. TURN, the organization awarded access to PGandE's billing envelopes, argued in its brief to the California Supreme Court that the California Commission's action should not be considered unconstitutional under the Court's opinion in *Wooley* because the Commission is not disseminating a particular ideology. Answer of Real Party In Interest Toward Utility Rate Normalization To Petition For Writ of Review With Memorandum of Points and Authorities, July 9, 1984, p. 50. But, the action of the California Commission cannot be regarded as ideologically neutral.

By choosing TURN, an organization dedicated to representing residential ratepayers, as the group that will be allowed to put its messages in PGandE billing envelopes, the Commission has, in effect, chosen the content of the messages that PGandE must send just as the State of New Hampshire chose a message in *Wooley.* TURN will not use PGandE's envelopes to argue that the rates charged to commercial customers are being used to subsidize lower rates for residential customers. Neither will it advance any other proposition it would regard as adverse to the interests of residential customers. From the standpoint of ideological neutrality, the choice of the message carrier is as offensive as the choice of the message.[4]

4. A municipality which allowed only one political party to use the public parks to seek new members could hardly answer a claim that it was violating First Amendment rights by pointing out that its action was ideologically neutral because it was not prescribing what could be said in the parks.

In *PruneYard Shopping Center* v. *Robins,* 447 U.S. 74 (1980), this Court found that the First Amendment rights of a shopping center owner were not violated by an interpretation of the California State Constitution requiring the owner to allow members of the public to exercise their free speech rights on the premises of the shopping center. The Court noted there, in distinguishing its holding in *Wooley,* that there was "no danger of governmental discrimination for or against a particular message" because no specific message had been chosen by the state for display. *Id.* at 87. Unlike the situation in *PruneYard,* in which any member of the public had equal rights of access to the shopping center, the California Commission has chosen the sole organization that will be allowed to use PGandE's property to send its messages. By making this choice, the California Commission has discriminated in favor of TURN messages on the basis of their content.

C. The California Commission Has Not Shown A State Interest Sufficiently Compelling To Justify Its Curb On PGandE's Rights To Free Speech.

As PGandE points out in its Jurisdictional Statement, the California Commission has asserted that the state's interest in assuring the fullest possible consumer participation in its regulatory proceedings and the most complete understanding of energy-related issues is sufficient justification for restricting PGandE's rights to free speech. Jurisdictional Statement, p. 23; Appendix to Jurisdictional Statement, pp. A21-22. The state interest identified by the Commission cannot be considered compelling, however, under *Buckley* v. *Valeo,* 424 U.S. 1 (1976), a case directly analogous to that of PGandE.

In *Buckley* v. *Valeo,* the Court ruled that provisions of federal law restricting the amounts of money that could be spent on political speech during election campaigns violated the First Amendment rights of those subject to the limitation. *Id.* at 58. The state interest asserted in *Buckley* v. *Valeo* as justification for the spending restrictions is directly comparable to the interest

claimed by the California Commission in restricting PGandE's speech.

It was argued in *Buckley* that the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" was sufficient justification to limit expenditures by individuals or groups on campaigns for particular candidates. *Id.* at 48. This is essentially the same as the California Commission's desire to increase the representation of consumer advocates in its regulatory proceedings. The Court held, however, that (*id.* at 48-49):

> "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . ."

The Court also pointed out, in striking down the limitation on expenditures a candidate could make from his own resources, that the "interest in equalizing the relative financial resources of candidates competing for elective office" was not an interest "sufficient to justify the provision's infringement of fundamental First Amendment rights." *Id.* at 54. Under *Buckley* v. *Valeo,* it is apparent that the California Commission's interest in enhancing the speech of TURN, or any other ratepayer organization, is not sufficient to justify the serious infringement of PGandE's First Amendment rights caused by the Commission's ruling.

CONCLUSION

The California Commission's requirement that PGandE include TURN messages in its billing envelopes raises constitutional issues of profound significance not only to PGandE and Con Edison, but to the entire investor-owned utility industry. If this Court does not give plenary consideration to PGandE's appeal, these issues will be decided for the entire industry without the benefit of a full judicial analysis. For this reason, the Court should note probable jurisdiction, and, after plenary consideration, reverse the judgment of the Supreme Court of California.

Dated: New York, New York
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BRIEF OF *AMICI CURIAE* PACIFIC NORTHWEST BELL TELEPHONE COMPANY, PACIFIC POWER & LIGHT COMPANY, AND OREGON INDEPENDENT TELEPHONE ASSOCIATION IN SUPPORT OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY'S JURISDICTIONAL STATEMENT

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INTERESTS OF *AMICI CURIAE*

Appellant Pacific Gas and Electric Company ("PGandE") filed a jurisdictional statement with this Court seeking review of California Public Utilities Commission ("CalPUC") Decision No. 83-12-047, as modified by Decision No. 84-05-039 (collectively, "Decisions"). The Decisions require PGandE to give to TURN, a private association purportedly representing the interests of PGandE's residential customers, free access to "extra space" within PGandE's billing envelopes. No court has heretofore reviewed the Decisions, for in early October, the Supreme Court of the State of California denied PGandE's petition for a writ of review. Because of the importance of the questions involved in the PGandE appeal, Pacific Northwest Bell Telephone Company ("PNB"),

Pacific Power & Light Company ("Pacific Power"), and Oregon Independent Telephone Association ("OITA"), through their counsel, requested and received consent from all parties to the proceedings below to submit this brief in support of PGandE's jurisdictional statement.

Amicus PNB is a Washington corporation providing telephone service to local exchange customers located in Oregon, Washington, and Idaho. Over 700,000 of its customers are located in Oregon. On November 6, 1984, the Oregon electorate enacted an initiative measure, popularly referred to as Ballot Measure 3. The text of Ballot Measure 3 is reprinted in the appendix to Appellant PGandE's jurisdictional statement ("App.") at A-142 through A-150. Ballot Measure 3 creates a private, nonprofit organization known as the "Citizens' Utility Board" ("CUB"), and requires, *inter alia*, that Oregon investor-owned utilities such as PNB allow the CUB to insert its material in such utilities' billing envelopes up to six times per year, all at no cost to the CUB so long as the weight of the CUB material does not exceed .4 ounce. Ballot Measure 3 at Sections 10-11; App. at A-147 and A-148. Moreover, Sections 12 and 17 of Ballot Measure 3 make "discourag[ing] the distribution of [CUB] material" a Class A misdemeanor, App. at A-149 and A-150, which under Oregon law is punishable by up to a year's imprisonment and a fine of up to $5000. Or. Rev. Stat. §§ 161.635, 161.655. While it is likely that the CUB will use the space in the utilities' billing envelopes in a manner adverse to the utilities' interests, Ballot Measure 3 imposes virtually no restrictions upon the use the CUB can make of the .4 ounce.

Amicus Pacific Power is an assumed business name for the electric operations portion of PacifiCorp, a Maine corporation. Pacific Power provides retail electric service in California, and accordingly is regulated by Appellee CalPUC. Therefore, the precedent established in this proceeding may directly affect Pacific Power's California electric operations. Pacific Power also provides retail electric service to customers located in Oregon, Washington, Idaho, Montana, and Wyoming. Because of its Oregon electric operations, Pacific Power, like PNB, is subject to the provisions of Oregon's Ballot Measure 3. In addition, there was recently pending before the Montana Public Service Commission, the state regulatory authority which governs Pacific Power's Montana retail operations, the question of whether that regulatory body has authority sufficient to allow it to require investor-owned utilities operating in Montana, including Pacific Power, to allow a newly-formed entity, calling

itself "Montana CUB," free access to the "extra space" in such utilities' billing envelopes. Because the Montana Commission determined that it lacked authority under state law to require utilities to make extra space in billing envelopes available to third parties, the issue of the constitutionality of such a requirement was not addressed. Montana Public Service Commission Order No. 5107 (December 24, 1984). In light of this disposition, it seems certain that the question of Montana CUB access to Montana utilities' billing envelopes will be presented to the 1985 session of the Montana Legislature.

OITA is an Oregon nonprofit association composed of independent investor-owned and cooperative telephone utilities. Most of the members of OITA are subject to the provisions of Oregon's Ballot Measure 3, discussed above.

A decision from this Court invalidating the Decisions would eliminate the California administrative precedent which could otherwise be injurious to *Amicus* Pacific Power's California electric utility operations. In addition, because even a brief perusal of Oregon's Ballot Measure 3 establishes that it is at least as constitutionally infirm as the Decisions which are the subject of the instant appeal, a decision on the merits in favor of Appellant PGandE would terminate the controversy surrounding Ballot Measure 3, which controversy directly and immediately affects all *Amici*. Finally, a decision in favor of PGandE would eliminate the pending Montana legislative confrontation over the ultimate question of Montana CUB's access to that state's utilities' billing envelopes.

SUMMARY OF ARGUMENT

This Court should exercise jurisdiction over this appeal because fundamental and pervasive constitutional values are at stake. Moreover, in the absence of such exercise, a state administrative agency's decision affecting those values will become the law of the land and have consequences of nationwide significance without any judicial scrutiny whatsoever. Addressing the substantive concerns, *Amici Curiae* urge that the Decisions are unconstitutional because (1) they compel PGandE to subsidize the dissemination of political views hostile to PGandE's interest in contravention of the first amendment, and (2) they result in the taking of PGandE's property without just compensation in violation of the fifth and fourteenth amendments.

ARGUMENT

It is disquieting that the parties must seek from this Court initial judicial review of the fundamental and substantial constitutional questions created by the Decisions. That the California state court system has avoided its role heightens the need for this Court to grant judicial review — if such review is denied, it will mean that a state administrative agency's resolution of basic and pervasive first and fifth amendment issues will become the law of the land without even so much as a formal judicial examination.

Basic first amendment questions have been raised and are properly before this Court — issues such as whether a private organization can, under the guise of state utility regulation, obtain the right to invade a private utility's sealed postage envelopes in order to espouse causes directly inimical to the utility's interests. There is also a first amendment issue involving both preemption of state law and selective advancement of political views based upon identity of the speaker; that issue is whether Congress, by passing the Public Regulatory Policies Act of 1978, 92 Stat. 3117, intended to allow states to prefer the dissemination of views antithetical to utility interests over the utilities' own views, all in the utilities' own vehicles of communication. Finally, the Decisions

have triggered basic fifth and fourteenth amendment issues, such as whether personal property which has long been devoted to an exclusively private use may be commandeered by the state and turned over to a second, private, use hostile to the owner's interest, all without offer (let alone payment) of just compensation. *Amici* submit that the Decisions cannot withstand scrutiny under any of these constitutional guarantees.

I

THE DECISIONS VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The first amendment, made applicable to the states through the fourteenth amendment, provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." The Decisions violate this most fundamental of guarantees in a number of respects. First, they force the utility to become the medium by which another's message is carried, in violation of the principle most recently espoused in *Wooley v. Maynard*, 430 U.S. 705 (1977). In that situation, this Court declared that, in the absence of a compelling state interest, the state could not force private entities — motorists — to display on their own private property ideological messages repugnant to the owner. In contradistinction to *Wooley*, however, the Decisions require PGandE to disseminate political views selected *because of* their hostility to PGandE's own. Moreover, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court invalidated a state statute requiring newspapers to grant reply space to candidates criticized in print. In contrast to the political candidate under editorial attack in *Tornillo* or the interest of the state in proclaiming its motto in *Wooley*, TURN cannot point to even an arguably valid state interest; indeed, it appears that TURN has been able to function effectively for many years without having been given free access to utility billing envelopes.

The second basis for invalidation of the Decisions on freedom of speech grounds is that PGandE is compelled to subsidize the dissemination of TURN's political views. Such compelled subsidization contravenes the principles enunciated in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In that case, this Court voided a state requirement

that individuals provide monetary support for a union's political actions not related to acting as the employees' exclusive bargaining agent. In essence, *Abood* stands for the proposition that an entity cannot be required to underwrite the expression of political views with which it does not agree. The case for judicial intervention in the current controversy is, if anything, significantly stronger than the case for intervention in *Abood;* here, PGandE is being compelled to underwrite views *intended* to be adverse to PGandE's interests.

The third freedom of speech claim created by the Decisions is that they produce unlawful discrimination against utilities' expression of views. Under Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117, electric utilities are prohibited from charging their customers for utilities' "political" advertising. However, the Decisions apparently require "extra" space in billing envelopes to be made available for TURN's political advertising purposes *because* such space is assumed to be chargeable to customers as a prudent expense for ratemaking purposes. Thus, the result of the Decisions is to discriminate on the basis of *whose* views are being advanced, and to allow only the anti-utility voice to be subsidized with ratepayer funds — even though the *utility* owns the envelope and paid for the postage. Similar content-based regulation of speech was invalidated in *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980); it should be set aside here as well.

II

THE DECISIONS VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The fifth amendment provides, "[N]or shall private property be taken for public use, without just compensation." Questions of "taking" under constitutional norms involve at least three essential determinations: (1) whether private property is involved, (2) whether a "taking" of such property has occurred, and (3) whether "just compensation" has been paid.

First, there is no question that utility private property is involved; PGandE funds purchase the envelopes, postage, and billing equipment. That costs related to billing envelopes, postage, and similar items are normally allowed to be charged to customers for ratemaking purposes does not render such property "public." As the Court stated as early as 1923, "the State . . . is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership." *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 288. Three years later, the Court held that customers do not acquire an interest in property simply because they pay the utility bills. *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23, 32 (1926). Indeed, in *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980), this Court continually referred to utility billing envelopes as private property. *Id.* at 532, 540. Accordingly, existing caselaw settles the matter: Utility billing envelopes are the property of the utility, *not* the state, and *not* the utility's customers. Thus, the first criterion of a fifth amendment violation — the existence of private property — is present in this case.

It is also clear that the Decisions constitute a "taking" of private utility property. For example, in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Court indicated that physical invasion of property is usually sufficient to constitute a taking. *Id.* at 124. Certainly state-enforced insertion of hostile material in a utility's billing envelope is such an invasion. Even more recently, the Court in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), held that an entity which had used its funds to develop a project could not be required to allow public access to the project without payment of just compensation. In its decision, the Court held that the "right to exclude," which

is universally acknowledged as a fundamental element of property rights, may not be taken without just compensation. *Id.* at 179-80.* Because neither TURN nor CalPUC has made even an offer of compensation, just or otherwise, the Decisions fail to meet the criteria of constitutionality under the fifth amendment.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Pacific Northwest Bell Telephone Company, Pacific Power & Light Company, and Oregon Independent Telephone Association urge this Court to consider the merits of the Decisions, and either (1) to set the case down for oral argument, or, alternatively, (2) to reverse the Decisions summarily.

Respectfully submitted,

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* In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court held that no taking occurs when the state prohibits barring political speech and debate on shopping center premises. In making this determination, the Court examined the owner's investment expectations, and held that investors' expectations would not be upset by allowing the use challenged. *Id.* at 83. Of course, utility investors' expectations *would* be upset by allowing TURN access to PGandE's billing envelopes, particularly when the purpose of such access would include the *decrease* of the returns to such investors.

(6)

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IN THE

Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the
Supreme Court of California

BRIEF OF AMERICAN GAS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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BRIEF OF AMERICAN GAS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

The American Gas Association (A.G.A.) submits this brief *amicus curiae* in support of the jurisdictional statement filed by the Pacific Gas and Electric Company (appellant). The A.G.A. believes that each of the questions and issues presented by the appellant should be reviewed by this Court.[1]

INTEREST OF THE *AMICUS CURIAE*

The A.G.A. is a national association representing the interests of approximately 300 member companies involved in the distribution and transmission of natural gas throughout the 50 states. Our member companies account for approximately 85

[1] Written permission from the parties to this litigation to file this brief as *amicus curiae* has been obtained and has been filed with the Clerk of this Court.

percent of all domestic utility sales of natural gas to end-users thereof. The Pacific Gas and Electric Company (PGandE), appellant in this case, is a member of the A.G.A.

In this case the California Public Utilities Commission, appellee, exercising its regulatory authority, has ordered that the messages and solicitations for money of a specific third-party private organization (Toward Utility Rate Normalization, hereinafter, "TURN"), be included in four of PGandE's 12 monthly billing envelopes each year for a period of two years. The Supreme Court of the State of California, without discussion, has denied further review of the Commission's ruling.

The order of the Commission is of vital importance to, and is likely to effect, each of the publicly held members of A.G.A., which constitute the vast majority of our membership. The Commission's order is predicated upon its interpretations of the federal constitution, interpretations which have never before obtained judicial approval and which limit severely the rights of regulated utilities to communicate with customers on issues important to those companies and their customers, and to refrain from addressing other issues. The Commission's order also nullifies the right of utilities to possess and use certain private property in its discretion to provide regulated service. Because of the unusual and widespread importance of the federal constitutional issues decided by the California Public Utilities Commission, the A.G.A. is filing this *amicus curiae* brief in support of the jurisdictional statement of PGand E.[2]

[2] The concept of government-mandated access to utility billing envelopes has recently prompted similar government action in the following states. Two state legislatures have authorized access to billing envelopes by Citizens Utility Boards: *Wisconsin*: Wis. Stat. Ann. §199.01 *et seq.* (West 1979); *Illinois*: Ill. Rev. Stat. ch. 111 2/3, §901 *et seq.* (1983). Two state commissions permit access to billing envelopes by consumer representatives: *California*: California Public Utilities Commission, Decision No. 83-12-047, December 20, 1983; *New York*: New York Public Service Commission, Case No. 28655, May 14, 1984. Further, on November 6, 1984, *Oregon* voters approved an initiative petition that requires utilities to include 6 CUB mailings over an unspecified period of time in their billing envelopes. Bills are pending in *Massachusetts* and the *District of Columbia* to establish CUBs and permit access to billing envelopes. Finally, citizens groups in *Nevada* and *Montana* have petitioned their respective commissions for access. Litigation concerning a state public utility commission's authority to compel third-party access to utility billing envelopes is pending in at least two states: *West Virginia-Citizen Action Group, et al.* v. *Public Service Commission of West Virginia, et al.*, Case Number 16512, In the Supreme Court of Appeals of West Virginia; *Consolidated Edison Company of New York, Inc. et al.*, Index No. 10762/84, In the Supreme Court of the State of New York, County of Albany.

SUMMARY OF ARGUMENT

The jurisdictional statement filed by PGandE presents genuinely important constitutional issues requiring this Court's resolution. The issues are central to the continued vitality of the First Amendment's guarantees of free speech and association as construed by this Court, and to the commercial relationships established by privately-owned utilities with customers and shareholders as those relationships are supported by the Fifth Amendment's prohibition against the taking of private property for public uses without just compensation. The California Public Utilities Commission has identified specific public policy goals, i.e., the assurance of the fullest possible consumer participation in Commission proceedings and the most complete understanding possible of energy-related issues, found them to be sufficiently compelling to justify limitations on First Amendment rights[3], ruled in the absence of legal precedent and principled analysis that a portion of the space in PGandE's billing envelope is the property of all PGandE's customers, and required that PGandE's billing envelope carry the message and requests for money of a specific third party. In so doing, the Commission has created a case of first impression by construing its regulatory powers as including the power to take for "public" use without compensation PGandE's billing envelope, in violation of the Fifth Amendment, and has required PGandE to use its billing envelope as the means of disseminating the third party's speech and requests for money, in violation of the First Amendment. This Court's review is

[3] A.G.A.believes these public policy goals to be laudable, and obtainable by other means not implicating constitutional guarantees.

required because the Commission's novel constructions of the First and Fifth Amendments are in contravention of this Court's holdings, and cause violations of rights protected by those Amendments.

I. THIS CASE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LIMITATION ON A STATE'S POWER TO TRANSFER TO UTILITY CUSTOMERS PROPERTY RIGHTS OF THE UTILITY PROTECTED BY THE FIFTH AMENDMENT

In a long line of cases construing the Fifth Amendment as a limitation on a state's power to regulate, this Court has consistently held that persons purchasing service from state-regulated utilities can thereby obtain no cognizable interests in the property purchased and used by the utility in providing that service. *See Smyth* v. *Ames*, 169 U.S. 466, 546 (1898) ("But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it."); *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23, 1 (1926) ("The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary."); *id.*, at 32 ("Customers pay for service, not for the property used to render it . . . By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock."); *United Railways & Electric Co. of Baltimore* v. *West*, 280 U.S. 234, 249 (1930) (" . . . the fundamental principle to be observed is that the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property").

This fundamental rule of law is an indispensable element in the system of privately-owned public utility companies developed in this country, in contrast with the assumptions and goals of public-ownership. Management of private utilities are allowed to conduct the business affairs of the utility with the additional incentive of reasonable financial reward to and by the investing public. Such rewards are themselves regulated pursuant to law, but as this Court noted in *Missouri ex rel. Southwestern Bell Telephone Company* v. *Public Service Commission of Missouri*, 262 U.S. 276, 289 (1923):

> It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of the public utility companies, and is not clothed with the general powers of management incident to ownership.

Indeed, in the last case in which the Supreme Court of California addressed squarely this issue of ownership of public utility property, *Pacific Telephone and Telegraph Company* v. *Public Utilities Commission of the State of California*, 34 Cal. 2d 822, 828-829 (1950), the court found clearly that "devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public."

In direct confrontation with uniform legal precedent and sound public policy, the Commission here has construed its enabling legislation as allowing it to define new state property rights and assign them to the collective body of utility customers. It has ruled that any unused space remaining in the utility's billing envelope (after the bill and any legally mandated notices are included), the use of which would not cause increased postage, belongs to those customers.[4] The envelope

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[4] The Commission described vaguely the interest of the customers as an "equity" right, with little indication of its meaning of that term. Appendix to the Jurisdictional Statement of Appellant (hereinafter "App."), at A-4.

itself, according to the Commission, remains the property of the utility. However, in order to assure that TURN's messages and requests for money are received by the utility customers, access to that envelope must be made available to TURN on a regular (4 months per year) basis.[5]

Thus, the Commission has thrown open the question of ownership of all other utility property by a discussion and order which provides no clear rationale for distinguishing, as a legal matter, between the right to use a utility's envelope and any access to or rights in use the customers may enjoy regarding any and all other property purchased and used by the utility.

This Court must vacate the Commission's order because, despite references to the "extra space" in the billing envelope, the direct effect of the order is that the billing envelope itself is commandeered and made to carry the messages and requests for money of a specific private third-party.[6] "Extra space," which simply does not exist in the absence of what the Commission has found to remain utility property, i.e. the billing envelope, is merely an elliptical manner of referring to one of the characteristics of that envelope. An envelope can carry, and that is why it has financial value, and why the utility purchased it. The concept of "extra space" is a function of a quirk of governmentally-established postal regulations. If such regulations were established more accurately, no "extra space" would exist.

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[5] A "taking" under the Fifth Amendment occurs when a restriction on private property "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). While PGandE's Jurisdictional Statement formally presents a First Amendment question alone, the Fifth Amendment is inextricably entwined therewith. *See* pp. 20-22, Jurisdictional Statement, and footnotes 14 and 15 therein.

[6] "The power to exclude has traditionally been considered one of the most treasured strands to an owner's bundle of rights." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

It is irrational to attempt to separate, for purposes of legal definition, establishment, and enforcement of rights, a physical object (to which property rights admittedly attach) from one of its characteristics. Long-standing 5th Amendment construction precludes the Commission from granting customers a property right of any kind in utility property.[7]

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF THE FIRST AMENDMENT IMPLICATIONS OF STATE ACTION ABRIDGING COMMERCIAL EXPRESSION AND REGULATING ITS SUBSTANCE

There can be no argument the PGandE's ability to use its billing envelope to assure that its customers receive information deemed relevant by the utility has been limited by the Commission's order. Four times per year, for two years, the billing envelope will be used to carry information concerning which the utility has made no determination of relevance or assistance to its customers.[8] Certainly, no opportunity remains for argument that PGandE is not entitled to freedom of speech. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978). It is an essential part of the protection afforded by the First Amendment not to speak or associate oneself with views of others. *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). And the practical effect of the

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[7] Even *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980) allowed third-party access to a privately owned shopping center on grounds the "[m]ost important" of which was that the property in question was "a business establishment that is open to the public to come and go as they please." 447 U.S. at 87. No property open to the public, even under the terms of the Commission's order, is involved here.

[8] "In my view, state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions." *Pruneyard, supra*, 447 U.S. at 97 (Justice Powell, joined by Justice White, concurring). While the public as a whole has not been granted access to PGandE's envelope, TURN's access must be read as considered by the Commission as appropriate because TURN purports to represent a substantial portion thereof.

Commission's order is clearly to do just that, i.e. the messages of TURN, which must be reasonably assumed to be contrary to those of PGandE in order to fulfill the Commission's goals are associated in the minds of the recipient customers by their mere presence in PGandE's envelope. It is unreasonable to assume that customers will separate TURN's message from its courier, PGandE, and the natural result is the imputation of concurrence and support by PGandE with and to the messages of TURN. At best, confusion is thrust upon the customer; at worst, misrepresentation.

The effect of the Commission's order is thus to dilute substantially the commercial speech capabilities of the utility.[9] The billing envelope is the means selected by management to collect accounts receivable and to communicate with its customers.

It has been true that acrimonious debate sometimes occurs between a utility and those purporting to represent independently the interests of its customers. For example, natural gas utilities typically take a longer-range view of what is a prudent investment in future supply than commission-appointed advocates who often seek cost-cutting in its most immediate and current forms. Hence the natural result of messages critical of a utility business decision is to put pressure on the utility to respond and answer what it considers misleading statements. As Justice Powell has noted, where private property is used pursuant to law to make available the speech of a third-party, the property owner "has lost control over his freedom to speak or not to speak on certain issues." *Pruneyard, supra*, 447 U.S. 74, at 99.

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[9] Clearly, the utility could simply pay extra postage and include its newsletter along with the third-party messages. The point is that the utility's envelope has been commandeered to carry the third party messages in the first place. As Chief Justice Burger observed in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 254 (1974), governmental coercion of an enforceable right of access to the means of speech publication "at once brings about a confrontation with the express provisions of the First Amendment. . . ."

Utilities clearly have a substantial interest in making efforts to communicate with their customers because of the competition with providers of other forms of fuel. Thus, the need to strengthen and preserve the voluntary commitment the customer has for the particular service provided by the utility is apparent. The pay-back implications of conversion from one form of fuel to another are often a matter of discussion in the public press and utility management may decide, not without some risk of alienating its customers who are accustomed to receiving and immediately trashing unsolicited messages in the mail, to speak to its customers for these reasons and/or to speak about public issues of concern.

The utility thus becomes a known, recognizable source of information and is understood to be a single voice with specific views. The value of the envelope used to carry its messages may vary from time to time, as issues float in and out of the public's eye, and the need for timely utterance of a particular message thereby grows or decreases. The envelope will also contain legally mandated notices about how the machinery of government is working and the effects thereof on the customer. But the billing envelope, simple as it may be, has often been the individual piece of private property used by management to keep this commercial relation of buyer and seller alive. The order's direct effect is to use this envelope to carry messages which may well injure that commercial relationship.

The limitation placed by the Commission upon the utility's right to engage in meaningful commercial speech to the degree it deems necessary is constitutionally defective because the order is based on the content of the speech required to be given access to the billing envelope. *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530 (1980). The infirmity of the Commission's limitation of speech when measured against this standard is that the Commission's finding of a compelling state interest was based directly upon a perceived need to upgrade the content of any public debate on Commision-related matters by replacing, in the "extra space," the speech of PGandE with the speech of TURN. The content of PGandE's speech was simply deemed insufficient to provide

the benefit to customers required by an "efficient" use of the extra space.[10] Straightforwardly, the Commission stated that "[i]t is reasonable to assume that the ratepayers will benefit *more* from exposure to a variety of views than they will from only that of PGandE." App., at p. 17 (emphasis added).

The Commission ordered the invasion of the utility's property in order to advance its interest in customers having as much information as possible about commission proceedings and thereby to assist the Commission in its duties, while describing its orders as based on "a purpose which significantly benefits" customers. App., at p. 51. Customer knowledge of issues pending before the Commission is a worthy goal; however, there are diverse and practical means of supporting such a marketplace of ideas, both existing and reasonably available, including the allowance of intervenor fees already provided, public funding of mailing by groups such as TURN, and direct solicitations by those groups. *See* Jurisdictional Statement, at pp. 24-25. None of those avenues involve a limitation of PGandE's constitutional rights and hence are indicative of the informity of the means selected by the Commission. For the breadth of government abridgement of First Amendment rights "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

[10] The "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976).

CONCLUSION

Probable jurisdiction should be noted and plenary consideration of this appeal should be granted.

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QUESTIONS PRESENTED

Whether decisions of the California Public Utilities Commission violate the First Amendment of the U.S. Constitution by compelling an investor-owned utility to disseminate in its monthly billing envelope the communications of a third party.

Whether the California Public Utilities Commission decisions violate the Taking Clause of the Fifth Amendment of the U.S. Constitution by ordering an investor-owned utility to carry in its billing envelope the communications of a third party.

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On Appeal from the Supreme Court of California

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

Edison Electric Institute (EEI) supports Pacific Gas and Electric Company (Appellant) in seeking review of the final judgment of the Supreme Court of California denying a writ of review of decisions of the Public Utilities Commission of the State of California (Commission) because those decisions violate First Amendment rights by compelling Appellant to disseminate in its monthly billing envelope the communications of a third party.[1] EEI urges the United States Supreme Court (Court) to review the California Supreme Court judgment for the additional reason that the Commission decisions take the private property of Appellant in violation of its Fifth Amendment rights by compelling it to carry in its billing envelope the messages of a third party.[2]

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[1] The written consents of all parties to the filing of this brief have been filed with the Clerk of this Court.

[2] As discussed at p. 3, *infra*, the Commission's violation of the Fifth Amendment was raised by Appellant both before the Commission and the Supreme Court of California. While Appellant has not directly presented the Fifth Amendment federal question in its

PARTIES TO THIS PROCEEDING

The parties to this proceeding are set forth in the jurisdictional statement.

OPINIONS BELOW

The opinions below are reproduced in the appendix (App.) to the jurisdictional statement.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions reproduced in the jurisdictional statement, the Fifth and Fourteenth Amendments to the Constitution are involved. These additional amendments are set forth in the appendix to this brief.

INTEREST OF EDISON ELECTRIC INSTITUTE

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve approximately 96 percent of all customers of the

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jurisdictional statement, the argument at pp. 20-22 of the statement addresses issues common to the resolution of both the First and Fifth Amendment questions, *i.e.*, whether the extra envelope space in monthly billing envelopes is utility property and whether the Commission may compel Appellant to carry in its property the messages of a third party. Because resolution of these issues under one amendment is so integrally related to resolution of the issues under the other, these are appropriate circumstances for this Court's consideration of a question not directly presented in the jurisdictional statement. *See Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980); *see generally* R. Stern & E. Gressman, Supreme Court Practice §§ 6.27, 7.14 (5th ed. 1978). Moreover, the language in Rule 15.1(a) of this Court's rules is not a limitation on the Court's authority to decide important questions not raised by the parties. *See Blonder-Tongue Laboratories, Inc.* v. *Univ. of Illinois Found.*, 402 U.S. 313, 320 n.6 (1971). Furthermore, the fact that an *amicus curiae* is raising the question, rather than a party, is no bar to its consideration. *See Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983); *Fry v. United States*, 421 U.S. 542, 545 n.5 (1975); *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265, 280 n.14 (1978).

investor-owned segment of the electric utility industry and 73 percent of the nation's electricity users.

EEI's members undertake many programs to enhance public understanding of the utility business and support increased consumer understanding of energy issues and utility rate proceedings. Furthermore, member companies are subject to comprehensive regulation pursuant to state law. But when commission regulation becomes overreaching to the point of being unconstitutional, EEI's members must object.

The constitutional questions arising in the instant case are present in actions that have been taken or considered in at least fifteen states. Because of increasing interest in obtaining access to utility mailings in recent years, EEI members have a strong interest in having this Court note probable jurisdiction.

Moreover, EEI's interest is in urging this Court to note probable jurisdiction to consider the Fifth Amendment Taking Clause issues in addition to the First Amendment issues. This consideration is especially important given the California Commission's failure to recognize the utility's property interest in the space within its billing envelope and the value of that interest.

STATEMENT OF THE CASE

EEI adopts the Statement of the Case presented in the jurisdictional statement.

THE FEDERAL QUESTIONS WERE RAISED BELOW

The jurisdictional statement shows that the First Amendment federal question was raised below before the Commission and the Supreme Court of California. Appellant also argued in its pleadings below that the Commission decisions violated the Fifth and Fourteenth Amendments of the United States Constitution. *See* Dec. No. 83-12-047, slip op. at 32-36; App. 24-27, Dec. No. 84-05-039, slip op. at 9; App. 52, and PGandE Petition for Writ of Review with Memorandum of Points and Authorities in Support Thereof, June 4, 1984 at 18-20, 23-32.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE CONSTITUTIONAL PRINCIPLES AT STAKE IN THIS CASE AFFECT THE RIGHTS OF MANY OTHER UTILITIES IN ADDITION TO APPELLANT.

The constitutional issues raised by the proceeding below will affect directly or indirectly far more than one utility in one state. In addition to the implications for the other utilities providing service in California, state legislatures and commissions in at least fourteen other jurisdictions have been and are considering proposals to create citizen utility boards (CUBs) with authority to include their messages in utility billing envelopes. The outcome of this proceeding will undoubtedly be a precedent influencing the actions ultimately taken in these states and others that may consider such proposals in the future.

Within the last several years alone, state legislatures in Wisconsin[3] and Illinois[4] have created state-wide CUBs with mandatory access to utility billing envelopes. More recently, voters in Oregon have passed a ballot initiative creating a CUB with similar access to utility billing envelopes. App. 142-50. Creation of CUBs with mandatory access to billing envelopes has been considered by voters in Missouri and state legislatures in Pennsylvania, Virginia, New York, Rhode Island, New Hampshire, Massachusetts, West Virginia and the District of Columbia.[5] Those states which have been hesitant to act because of doubts over the constitutionality of such programs will be emboldened if this Court declines to subject the California Commission's actions to

[3] Wis. Stat. Ann. § 199.10 (West 1984).

[4] Ill. Ann. Stat. ch. 111 2/3, ¶ 909 (Smith-Hurd 1984).

[5] Missouri Ballot Proposition D, 1982; H. 1368, 1983 Sess., Pennsylvania; S. 392, 1984 and 1985 Sessions, Virginia; S. 9188-B and A. 11250-A, 1982 Sess., and S. 1197-A and A. 1437-A, and S. 7467 and A. 6922, 1983 Sess., New York; No. 84-S-0370, 1984 Sess., Rhode Island; H. 842, 1983 Sess., New Hampshire; H. 5756, 1984 Sess., Massachusetts; S. 272, 1984 Sess., West Virginia; No. 5-546, 1984 Sess., District of Columbia.

the constitutional scrutiny they merit. If this Court declines to take this appeal, the constitutional controversy associated with the CUB movement will remain unresolved.

For instance, in an administrative proceeding presenting the same constitutional issues as those raised in this case, the New York Public Service Commission has issued a Statement of Policy concerning the creation of CUBs that would have access to utility billing envelopes. App. 111-41. Legislation to create a CUB having failed in 1982 and 1983,[6] the New York Commission is acting under its general regulatory authority, in much the same manner as did the Commission below. The New York Commission's actions are now being litigated in state court.[7]

The West Virginia Public Service Commission has considered a specific request of consumer groups for access to a utility's billing envelopes in that state. Although the commission there decided it lacked statutory authority to do so, its ruling is now on appeal to the state supreme court of appeals.[8] Similarly, in Montana an existing CUB petitioned the Montana Commission to gain access to utility billing envelopes. The commission in a recent order denied the petition on grounds that it lacked authority to issue such an order.[9]

Finally, the Nevada Commission initially docketed a proceeding to consider the petition of a consumer group

[6] See n.5, *supra*.

[7] *National Fuel Gas Distribution Corp.* v. *Pub. Serv. Comm'n*, Index No. 14888-84 (N.Y. Sup. Ct. filed Dec. 13, 1984), and *Consolidated Edison Co. of New York, Inc.* v. *Pub. Serv. Comm'n*, Index No. 10762-84 (N.Y. Sup. Ct. filed Aug. 31, 1984).

[8] *West Virginia Citizen Action Group* v. *Appalachian Power Co.*, 60 PUR 4th 184 (W. Va. P.S.C. 1984), *appeal docketed, West Virginia Citizen Action Group* v. *Appalachian Power Co.*, No. 16512 (W. Va. filed July 19, 1984).

[9] *In re Joint Petition of Montana Citizens Utility Board for Declaratory Ruling and Rulemaking*, Docket No. 84.10.69, Order No. 5107 (Mont. P.S.C. Dec. 24, 1984).

which sought adoption of a regulation declaring that extra envelope space is ratepayer property and inviting proposals on how and by whom that space should be utilized. That proceeding has been superseded by a proceeding in which the Nevada Commission is considering whether it has jurisdiction over extra space which might exist in utility billing envelopes.[10]

The First and Fifth Amendment principles at stake in this case are present in the actions taken or proposals considered in all these states. In addition to the clear First Amendment issues, EEI believes private property has been or would be taken without just compensation in violation of the Taking Clause of the Fifth Amendment under every one of the statutes and access proposals addressed above. In some cases, no provision has been or would be made for any kind of compensation to utilities. In other cases, although utilities have been or would be partially or totally reimbursed for the incremental costs of inserting third-party messages, the utilities have not been nor would they be compensated for the value of the property taken, under traditional Fifth Amendment analysis.

This Court five years ago had occasion to decide important constitutional issues concerning a utility's *own* use of its billing envelope. *Consolidated Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530 (1980); *Central Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557 (1980). But the instant case is the first in which a state commission order requiring a utility to include in its billing envelopes the messages of a *third party* has been presented to this Court for review. The Commission decisions which are the subject of this appeal, decided by a bare majority of the five California Commissioners

[10] *In re Petition by the Coalition of Concerned Citizens to Adopt Rule Declaring Extra Space in Billing Envelope to Be Ratepayer's Property*, Docket No. 84-761 (Nev. P.S.C. filed July 25, 1984; withdrawn Nov. 20, 1984); *In re Investigation of Commission Jurisdiction Over Extra Space in Utility Billing Envelopes*, Docket No. 84-1129 (Nev. P.S.C. commenced Dec. 3, 1984).

over the vigorous and well-reasoned dissent of the sole lawyer on that body, present significant new constitutional issues which require resolution. Because the Commission decisions are likely to become a bellwether for action in other states, it is important for the Court to note probable jurisdiction to provide much-needed direction to legislatures and commissions across the country.

II. THE COMMISSION DECISIONS ABRIDGE THE FIRST AMENDMENT RIGHT OF FREE SPEECH.

A. The Commission Decisions Violate First Amendment Rights By Displacing Appellant's Communications And By Compelling Appellant To Disseminate The Messages Of A Third Party.

The Commission decisions compelling Appellant to allow access by a third party to its monthly billing envelopes violate Appellant's First Amendment rights[11] in two fundamental ways. In the first instance, compelling Appellant to carry in its own billing envelope the messages of another will severely impinge upon Appellant's ability to use the envelope to transmit its own views to its customers. Second, forced dissemination of third-party messages compels Appellant to be associated with messages with which it may disagree.

1. *Appellant's Right to Communicate with its Customers through its Billing Envelope Has Been Abridged.*

For sixty years Appellant has included in its billing envelope an insert carrying educational messages on energy and utility-related matters. Compelling Appellant to carry the messages of the intervenor group Toward Utility Rate Normalization (TURN) in the billing envelope will consume some and perhaps all of the space

[11] Regulated utilities, no less than corporations generally, enjoy the same First Amendment protections that are extended to all persons. *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777, 784 (1978); *Central Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980); *Consolidated Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 533, 534 n.1 (1980).

available within the envelope for Appellant to express its own views. Indeed, Appellant's communications may be entirely displaced four times a year because, under the Commission decisions, TURN's message will have priority over Appellant's insert and TURN will have the sole discretion to determine the length and weight of the messages that it will place in Appellant's billing envelope. Dec. No. 83-12-047, slip op. at 41-43; App. 32-33, *as modified by* Dec. No. 84-05-039, slip op. at 11; App. 53. The extent to which Appellant will be able to continue to communicate with its customers during these months without exceeding the one ounce postal weight increment will be left entirely to the choice of TURN. The First Amendment is plainly offended by this repression of Appellant's speech. *Consolidated Edison Co.* v. *Pub. Serv. Comm'n, supra,* 447 U.S. at 534; *Central Hudson* v. *Pub. Serv. Comm'n, supra.*

2. *Appellant's Right to Refrain from Disseminating the Views of Others Has Been Violated.*

By compelling Appellant to disseminate TURN's communications in its billing envelope, the Commission has forced Appellant to associate with and promulgate TURN's message when it would otherwise refrain from expressing such views. This requirement runs contrary to the principle that freedom of speech includes the right not to communicate or transmit someone else's messages. *West Virginia State Bd. of Education* v. *Barnette,* 319 U.S. 624 (1943); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974); *Wooley* v. *Maynard,* 430 U.S. 705 (1977).

The latter two cases set forth the relevant constitutional principles which apply when a state seeks to compel someone to associate with the views of another.[12] At

[12] It is important to note that the Commission decisions would compel Appellant to use its own private property to transmit TURN's messages. However, use of extra space within the billing envelope has been limited exclusively to Appellant; the billing envelope has never been held open to the public. These facts render this Court's holding in *Pruneyard Shopping Center* v. *Robins,* 447 U.S. 74 (1980), inapplicable to this case. *Pruneyard* involved a right of public access to a privately-owned shopping center for purposes of speaking and petitioning which was upheld because, *inter alia,* the shopping center, by the choice of its owner, had been held open to the public. In this case no such access has been permitted.

issue in *Wooley* was a state requirement that individuals display license plates bearing the state motto, "Live Free or Die." The Court held in *Wooley* that individuals could not, under the First Amendment, be forced to carry the state's message. At the heart of that ruling was the "principle that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." 430 U.S. at 714. Similarly, in *Miami Herald* this Court struck down a state statute requiring newspapers to print a political candidate's reply to press criticism, holding that the constitutionally protected right to refrain from speaking must prevail over a state-created right of access. 418 U.S. at 256.

Wooley and *Miami Herald* are analogous to this case and make clear that the state violates First Amendment freedoms when it attempts to force an individual or corporation to publish or display a message containing the views of others on its private property. This is no less true where the speaker is a regulated corporation such as Appellant. *Consolidated Edison Co.* v. *Pub. Serv. Comm'n, supra.* As *Wooley* demonstrates, the state cannot compel Appellant to carry and disseminate the communications of TURN in its privately-owned billing envelope for the express purpose that the messages be read by the utility's customers. 430 U.S. at 714.

B. The Abridgment Of First Amendment Rights Cannot Be Justified Under Any Of This Court's Narrow Tests For Permissible Regulation Of Speech.

Governmental infringement of the First Amendment right of free speech has been tolerated only in exceedingly narrow circumstances. In *Consolidated Edison,* this Court delineated three doctrines that the state may invoke to justify a regulation which restricts a utility's

right to communicate its own views. Such governmental regulation may be justified only as a "permissible subject-matter regulation," a "reasonable time, place, or manner restriction," or a "narrowly tailored means of serving a compelling state interest." 447 U.S. at 535. Similarly, in *Wooley*, 430 U.S. at 716-17, the Court articulated elements which closely parallel the final test under *Consolidated Edison* as the constitutionally acceptable justification for governmental action which compels an individual to disseminate the message of another: the restriction must be based upon a compelling state interest that cannot be achieved by narrower means which are less restrictive of First Amendment rights. We demonstrate below that none of these narrow exceptions supports the state's action in this case.

1. *The Commission Decisions Repressing Appellant's Right to Communicate Are Neither Valid Subject Matter Nor Reasonable Time, Place, or Manner Regulations.*

Two of the possible justifications for repressing Appellant's right to communicate its own views may be dismissed at the outset. First, the Commission cannot justify its decisions as permissible subject matter regulation because Appellant's speech neither falls within any of the well-defined and narrowly limited classes of speech where such regulation has been allowed (*e.g.*, *Miller* v. *California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942) (fighting words)), nor satisfies the alternative ground that the speech being regulated occur on government-owned property. *Greer* v. *Spock*, 424 U.S. 828 (1976) (political speech at a military base); *Lehman* v. *Shaker Heights*, 418 U.S. 298 (1974) (advertising space on city transit system vehicles).

Second, the regulation cannot be construed as a reasonable time, place, or manner restriction because the state-sponsored displacement of Appellant's communication by TURN's message is not content neutral; that is, the Commission decisions favor some viewpoints at the

expense of others. *Consolidated Edison*, 447 U.S. at 535-36; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972) (unconstitutional to give special status to labor picketing); *Regan* v. *Time, Inc.*, —— U.S. ——, 104 S.Ct. 3262, 3266-67 (1984) (federal statute allowing one type of reproduction of U.S. currency and prohibiting another based on content of message ruled unconstitutional).[13] Moreover, the repression of Appellant's right to communicate cannot be a reasonable time, place or manner restriction because the regulated speech does not involve a public forum.[14]

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[13] The Commission stated that its primary purpose was to determine "how to use the economic value of the extra space more efficiently for the ratepayers' benefit." Dec. No. 83-12-047, slip op. at 28; App. 21. *See also id.* at 6; App. 4. From the outset, the Commission's goal was to change the existing use of the billing envelope to allow a use which it considered "more efficient," and to benefit ratepayers by exposing them to a wider variety of views than they would otherwise receive from Appellant through its bill inserts. *Id.* at 23; App. 17. In *Consolidated Edison*, 447 U.S. at 537, this Court rejected the argument that a content ban on certain utility speech could be justified on the ground that it assured that "consumers will benefit from receiving 'useful' information." Similarly, in *Miami Herald*, 418 U.S. at 247-48, the Court rejected a right to reply in a newspaper grounded on the assertion of a governmental obligation to ensure that a wide variety of views reach the public. In this case the constitutional concern is that the state regulation relies upon a determination as to the value of one speaker's viewpoint versus that of another's.

The conclusion that the Commission engaged in prohibited content analysis is inescapable. Without evaluating the value of Appellant's and TURN's differing viewpoints, the Commission could not have concluded that inclusion of TURN's messages in the billing envelope four times per year would be a more beneficial use of space in the envelope than Appellant's continued use of its own billing envelope on those occasions. By favoring the inclusion of TURN's messages and displacing Appellant's, the Commission has made an impermissible judgment about the substance of Appellant's speech. To do so is to discriminate on the basis of content in violation of the First Amendment.

[14] We have not addressed whether the Commission decisions have satisfied two other criteria in the test for valid time, place, or manner restrictions of speech, *i.e.*, serving a significant governmen-

2. *The State Cannot Demonstrate that its Regulation Repressing Appellant's Right to Communicate and Requiring Appellant to Associate with Third-Party Messages Is a Narrowly Tailored Means of Serving a Compelling State Interest.*

This Court held in *Consolidated Edison*, 447 U.S. at 535, 541, that a governmental restriction of a utility's right to communicate, such as that contemplated by the Commission decisions, may be sustained only if the government can demonstrate that the restriction is a "narrowly tailored means of serving a compelling state interest." *See also Wooley* v. *Maynard, supra*, 430 U.S. at 716-17;[15] *First Nat'l Bank v. Bellotti, supra*, 435 U.S.

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tal interest and leaving open alternative channels for communication. *Regan* v. *Time, supra*, 104 S. Ct. at 3266-67. Assuming *arguendo* that those requirements were met and the restriction on Appellant's speech were deemed to be content neutral, the state's regulation would still be unconstitutional. The cases that have validated reasonable time, place, or manner regulations apply only to regulation of speech on *public* property or at a *public* forum. See, *e.g.*, *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (streets, alleys, and thoroughfares); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (jail). As discussed below (see III.A, *infra*), Appellant's billing envelopes are its own private property and not the property of ratepayers, the Commission, or any governmental entity. Nor has Appellant held the billing envelopes open to the public. Accordingly, the limited precedent authorizing reasonable time, place, or manner restrictions on speech occurring at public *fora* will not provide any cognizable basis for the restriction of Appellant's speech.

[15] *Wooley* articulated the additional constitutional precondition, in the context of governmental efforts to compel individuals to carry the message of a third party, that the governmental *interest* underlying the regulation be ideologically neutral. In *Wooley*, 430 U.S. at 717, the regulation failed because the state's interest was dissemination of an ideological viewpoint. Similarly, the Commission in this case fosters a particular ideology, that of TURN. Notwithstanding the Commission's official pronouncements, the Commission cannot successfully contend that its interest in allowing *TURN* to obtain greater distribution of its viewpoints is "ideologically neutral." While the Commission has stated its interests as greater consumer participation in its proceedings and enhanced knowledge of energy issues, the Commission in practice has singled out a group with a particular ideological bent and

at 786; *Elrod* v. *Burns*, 427 U.S. 347, 362-63 (1976). The Commission has met neither of these elements.

a. *The interests identified by the Commission are not compelling.*

The Commission stated the interests to be served by its decisions as "the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete [consumer] understanding possible of energy-related issues." Dec. No. 83-12-047, slip. op. at 29; App. 22, *quoting* Dec. No. 83-04-020, slip op. at 17; App. 103. While these goals may be worthwhile, they fall far short of passing the compelling interest test.

The Commission's interests pale by comparison to interests determined to be non-compelling by this Court. *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (maintaining strict separation of church and state); *First Nat'l Bank* v. *Bellotti, supra* (sustaining active role of individual citizen in electoral process to maintain confidence in government and protecting shareholders whose views differ from those expressed in the political arena by corporate management). In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the government sought to limit campaign expenditures by federal political candidates, including expenditures made from their own personal resources. One of the governmental interests served by the expenditure ceilings was stated as "equalizing the relative ability of individuals and groups to influence the outcome of elections. . . ." *Id.* at 48.

The governmental interest in *Buckley* is not unlike the objectives asserted by the Commission. In each instance the interest involves promoting balanced representation in a governmental process by enhancing the abilities of participants to influence the outcome. Yet in *Buckley*

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given them access to the avenue of communication provided by Appellant's billing envelopes. Even if the Commission's generally stated interests are neutral, the manner in which the interests have been pursued, by using TURN as the mouthpiece, is not ideologically neutral. Hence, the regulation cannot withstand constitutional scrutiny.

this Court found that equalizing participation in the electoral process was insufficient to justify the attendant infringement of fundamental First Amendment rights. The interest failed because "the concept that the government may restrict the speech of some elements of society in order to enhance the voice of others is wholly foreign to the First Amendment. . . ." *Id.* at 48-49. So too in this case the governmental interest in widespread distribution of information and participation in Commission proceedings may not be served at the expense of Appellant's First Amendment freedoms.

b. *The Commission decisions are not narrowly tailored because they ignore readily available alternatives.*

Even if the state's interest in repressing Appellant's own speech and directing it to distribute TURN's messages could be considered compelling, the Commission decisions must still fail. *Consolidated Edison* and *Wooley* require that the means selected to accomplish a compelling state interest be narrowly drawn. If a state has available a variety of equally effective means to the desired end, it must choose the alternative which is least restrictive of First Amendment interests. *See Shelton* v. *Tucker*, 364 U.S. 479 (1960) (state statute unconstitutional because state interest in fitness and competence of publicly employed teachers could be served by means narrower than requirement that teachers report annually all organizations with which they have been associated over five-year period).

In this case, the state has before it a panoply of available alternatives which would further the Commission's objectives without infringing Appellant's First Amendment rights. For example, representation of consumer interests in Commission proceedings could be accomplished by enhanced state funding of the Commission's staff or direct funding of TURN itself or other entities. The state legislature could create a new entity with the sole objective of expanding consumer representation in Commission proceedings.[16] Moreover, consumer messages could be disseminated in state mailings, such as those which transmit tax returns or vehicle registration forms, or in public service broadcast announcements. Similarly, the interest in developing understanding of energy-related issues could be accomplished by dissemination of information by the Commission itself or other state agencies, such as the California State Energy Resources Conservation and Development Commission. The state could employ its vast educational system as well to educate the public in this regard.

This Court has repeatedly held:

> [E]ven though the governmental purpose [is] legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton, 364 U.S. at 488 (footnotes omitted). The option selected in the Commission decisions is unconstitutional because it does not comply with this Court's longstanding mandate that the government adopt the least restrictive means of achieving its goal.

III. THE COMMISSION DECISIONS VIOLATE THE TAKING CLAUSE OF THE FIFTH AMENDMENT.

The Commission decisions must also fail because they violate the Taking Clause of the Fifth Amendment of the U.S. Constitution, as made applicable to the states by the Fourteenth Amendment of the Constitution. Galloping past fundamental principles of public utility law, the

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[16] The state, for example, could authorize the attorney general to represent general ratepayer interests or create a consumer protection board, as is the case in New York (N.Y. Exec. Law §§ 63, 553 (McKinney 1982)), or establish an agency specifically to represent the interests of ratepayers at public utility commission proceedings, as is done by the District of Columbia Office of People's Counsel. D.C. Code Ann. § 43-406 *et seq.* (1981).

Commission hurdles over the Fifth Amendment implications of its actions. Rather than following precedents of this Court that require a contrary result, the Commission finds that ratepayers obtain a property interest in extra envelope space simply by paying their utility bills. In allowing a self-appointed representative of those ratepayers to use that extra space, the Commission reasons that ratepayers are using only that which is already their own. We demonstrate below, however, that the envelope and all the space within it are utility property, and that by granting a third party physical access to Appellant's private property, the Commission has taken that property in violation of the Fifth Amendment.

A. This Court's Decisions Demonstrate That Extra Envelope Space Is Utility Property, Not Ratepayer Property.

In the Commission's view the extra space in Appellant's billing envelopes is "considered as ratepayer property" (Dec. No. 83-12-047, slip op. at 5; App. 3, *quoting* Dec. No. 93887, 7 CPUC 2d 349 (1981); App. 72), even though the Commission acknowledges that the envelope itself is utility property. Dec. No. 83-12-047, slip op. at 4; App. 2-3. The Commission's strained reasoning is contrary to fundamental principles of public utility law.

In *United Rys. & Elec. Co. of Baltimore* v. *West*, 280 U.S. 234, 249 (1930) (overruled on other grounds in *Fed. Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 606-07 (1944)), the Court stated, "[T]he property of a public utility, although devoted to the public service and impressed with a public interest, is still private property. . . ." Thus, the entirety of the billing envelope—including the extra space within it—is the property of the utility. This principle is reflected in a more recent statement by this Court in *Consolidated Edison* v. *Pub. Serv. Comm'n, supra*, 447 U.S. at 540: "[Consolidated Edison] seeks merely to utilize *its own billing envelopes* to promulgate its views on controversial issues of public policy" (emphasis added).

Accordingly, when ratepayers pay their monthly utility bill they pay for service; they do not purchase the extra space in the billing envelope or any other utility property. Properties and facilities paid for by a utility with funds received for electric service are owned by the utility. This principle was articulated in *Board of Pub. Util. Comm'rs* v. *New York Tel. Co.*, 271 U.S. 23, 32 (1926):

> *Customers pay for service, not for the property used to render it.* Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. *By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience* or in the funds of the company. *Property paid for out of moneys received for service belongs to the company,* just as does that purchased out of proceeds of its bonds and stock.

(Emphasis added.)[17]

If the Court does not use this case to reaffirm that principle, the rationale of the Commission decisions could be extended to the billing envelopes and property of other regulated utilities, such as gas and telephone companies. Moreover, there is no logical way to distinguish between regulated utilities and other industries for purposes of this constitutional analysis. Finally, if paying a utility bill gives a ratepayer a property interest in the extra envelope space, that same analysis logically provides the basis for claiming that ratepayers have interests in other property or facilities used to provide utility service. If customers own whatever is included in the cost of service, which provides the basis for the utility rates that customers pay, the Commission's analysis could dictate that extra office space or extra computer capacity also belongs to ratepayers.

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[17] The principle that payments for utility service do not create a ratepayer interest in property used to render the service has been followed by numerous regulatory authorities. See, *e.g.*, *Philadelphia Suburban Water Co.* v. *Pennsylvania Pub. Util. Comm'n*, 427 A.2d 1244, 1246-47 (Pa. Commw. Ct. 1981); *Duke Power Co.*, 48 FPC 1384, 1395 (1972).

B. Granting A Third Party The Right To Utilize Extra Envelope Space Constitutes An Unlawful Taking Of Private Property.

The Fifth Amendment states in relevant part: "[N]or shall private property be taken for public use, without just compensation." Dismissing the Taking Clause issues, the Commission stated:

> In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious.

Dec. No. 84-05-039, slip op. at 9; App. 52. *See also* Dec. No. 83-12-047, slip op. at 40; App. 31.

The discussion in III.A, *supra*, demonstrates that the Commission decisions affect utility property. The reasoning used to avoid a Taking Clause analysis is fallacious and disingenuous. The Commission went to such lengths to avoid finding that extra envelope space is utility property because otherwise it would have had (1) to search in vain for explicit legal authority from the state constitution or legislature to exercise the power of eminent domain over Appellant's property, (2) to make the public use finding that is a prerequisite for a constitutional taking under the Fifth Amendment, and (3) to determine the value of the property taken for which just compensation would have to be paid.

Current judicial analyses of property concepts under the Fifth Amendment have adopted a "bundle of rights" approach, which includes, *inter alia*, the rights to possess, use, and dispose of property, and the right to exclude others from using property. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 435 (1982). For the past sixty years, Appellant has utilized the space in its billing envelopes for billing materials, legal notices

and its own newsletter. It has not allowed third parties to use the extra envelope space.

In *Loretto* the Court held that the minor but permanent physical occupation of a landlord's apartment building by installation of cable television equipment, authorized by state government, constituted a taking of property for which just compensation is due under the Fifth and Fourteenth Amendments. *Loretto* stands for the proposition that when the state restricts a person's use of her own property by allowing another party to use it, there is, indeed, a physical taking of the rights to possess, use and dispose of property:

> To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. *The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.*

458 U.S. at 435 (footnote omitted and latter emphasis added).

Appellant has been stripped of its traditional power to exclude the materials of others from its envelope. Not only has the Commission unlawfully taken the power to exclude, but it has also subordinated Appellant's own message so that TURN's material permanently occupies [18]

---

[18] " 'The one incontestable case for compensation . . . seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.' " *Loretto*, 458 U.S. at 427 n.5 *quoting* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) (footnote omitted); *see also United States* v. *Causby*, 328 U.S. 256, 266-67 (1946); *United States* v. *Petty Motor Co.*, 327 U.S. 372, 374-75, 384-85 (1946); *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U.S. 621, 657-59 (1981) (Brennan, J., dissenting).

Appellant's property four times per year for two years. In doing so, the Commission has violated the Fifth Amendment.[19]

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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[19] The requirement of just compensation is not satisfied, as the Commission has attempted, merely by ordering TURN to pay Appellant all the incremental costs which it incurs by inserting TURN's communications. *See* Dec. No. 83-12-047, slip op. at 31, 41; App. 23, 32. Just compensation has generally been recognized as being the value of the property taken, not merely the incremental costs of the services provided. Even the Commission recognized that there is substantial economic value to the extra envelope space by pointing to the sale of that space for commercial advertising by a utility in another state. Dec. No. 84-05-039, slip op. at 4; App. 48. The value of extra envelope space is also evidenced by the rapid growth of product advertising inserts in the monthly bills of gasoline companies, department stores and major credit card companies.

APPENDIX

ADDITIONAL CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> Section 1. Citizens of the United States
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From The Supreme Court Of California

BRIEF OF SIERRA PACIFIC POWER COMPANY AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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Appellee.

On Appeal from the Supreme Court of California

BRIEF OF SIERRA PACIFIC POWER COMPANY AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

Sierra Pacific Power Company ("Sierra Pacific") respectfully submits this brief as amicus curiae in support of the jurisdictional statement of Appellant Pacific Gas and Electric Company ("PG&E"). The parties have given their written consent to the filing of this brief, and copies of the letters of consent have been filed with the clerk of this Court.

STATEMENT OF THE CASE

By *TURN v. PG&E*, Decision No. 83-12-047[1], dated December 20, 1983, modified by *TURN v. PG&E*, Decision No. 84-05-039, dated May 2, 1984, the Public Utilities Commission of the State of California ("PUC") ordered PG&E to insert in PG&E's billing envelopes materials submitted by a private consumer-representative organization called Toward Utility Rate Normalization ("TURN"). App. at A-45. The order requires PG&E to insert TURN's material in the "extra space" in PG&E's billing envelopes four times a year for the next two years. "Extra space" is defined by the PUC as the space remaining in the billing envelope, after inclusion of PG&E's monthly bill and any required legal notices, which could be filled without having to pay additional postage. App. at A-3.

PG&E sought California Supreme Court review of the PUC's decision on the grounds, among others, that such decision violated the First and Fifth Amendments to the United States Constitution. By Order dated October 4, 1984, the California Supreme Court denied PG&E's petition for writ of review. App. at A-73. PG&E has appealed to this Court.

INTEREST OF THE AMICUS CURIAE

Sierra Pacific is an investor-owned public utility engaged in the generation, purchase, transmission, distribution and sale of electric energy in Nevada and California. The company, incorporated in Nevada, provides electric service to an area part of which is in California and part of which is in Nevada. In addition, the company provides gas and water service in Nevada. It is subject to the jurisdiction of two state utility regulatory commissions, the PUC and the

[1] Reproduced in Appendix to the Jurisdictional Statement of Appellant Pacific Gas and Electric Company ("App."), A-1.

corresponding Public Service Commission of Nevada ("Nevada Commission"). Sierra Pacific mails bills to electric customers in both California and Nevada. All bills are prepared at one billing center in Nevada without regard to state residence of the customer.

If the order directed at PG&E is allowed to stand, the PUC can be expected to issue a similar order directed at Sierra Pacific, with resultant invasion of Sierra Pacific's constitutional rights.

If the order directed at PG&E is allowed to stand, the Nevada Commission is likely to be encouraged to take a similar step but with an order reflecting the circumstances of Nevada. Sierra Pacific may be caught in the position of being unable to satisfy the inconsistent directives of two state regulatory commissions concerning the same extra space.[2]

Even if the Nevada Commission were to issue an order compatible with that of the PUC or were to refrain altogether from issuing an order on use of billing envelopes, Sierra Pacific could find itself in a difficult practical situation requiring separate bill sorting and reorganization of its entire billing system.

If Sierra Pacific were required to make its extra envelope space available to third parties, it would by necessity be involved in the expected wrangling over that space. Competing groups would likely file requests for use of the limited extra space. The utility would be forced to appear in state regulatory proceedings to determine which groups should be given extra space. The utility would be faced

[2] The Nevada Commission has in fact instituted a rule-making proceeding to consider whether it has jurisdiction over the extra space and, if so, to consider what rules it should issue. *In Re Investigation of Commission Jurisdiction over Extra Space in Utility Billing Envelopes*, Docket No. 84-1129, (Notice dated Jan. 7, 1985).

with the practical difficulties of determining whether the third party's materials comply with the order (i.e., weight of paper, size of envelope, and the like), and of ensuring that the materials are properly received and inserted in the extra space.

Finally, Sierra Pacific would be faced with the practical concerns of having to compete itself with various groups over the use of the available extra space in Sierra Pacific's envelopes.

Sierra Pacific supports PG&E's Jurisdictional Statement in its appeal from the PUC's order, and requests this Court to note probable jurisdiction. Sierra Pacific joins PG&E's argument that the PUC's order violates the First Amendment to the United States Constitution for the reasons set forth in PG&E's Jurisdictional Statement, as well as for the reasons set forth below. In addition, Sierra Pacific believes that the PUC's order violates the prohibition in the Fifth Amendment to the United States Constitution against a taking of private property without just compensation. This issue was raised below by PG&E[3] and is commented on in its Jurisdictional Statement. Jurisdictional Statement at 7-9.

SUMMARY OF ARGUMENT

There are two basic reasons why the PUC's decision is unlawful. First, the PUC's order violates the Fifth Amendment's prohibition against taking without just compensation. A utility's billing envelope, including any extra space,

[3] PG&E first raised the issue before the Commission. *See TURN v. PG&E*, Decision No. 83-12-047, App. at A-1, A-24, A-27. It raised the issue again in the Supreme Court of California its Petition for Writ of Review filed with that court on June 4, 1984. *See* Jurisdictional Statement at 8-9; *See also Petition for Writ of Review with Memorandum of Points and Authorities In Support Thereof* at 67-70.

is the utility's private property. By paying bills for service customers do not acquire any interest, legal or equitable, in the property paid for out of monies received for service, and such property belongs to the utility. *Board of Public Utility Commissioners v. New York Telephone Company*, 271 U.S. 23, 32 (1926). Each time a third party inserts materials in a utility's billing envelope, the result is a permanent, physical taking within the standard enunciated in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Under the Fifth Amendment such taking is unlawful in the absence of just compensation.

Secondly, the PUC's order violates the First Amendment's prohibition against restrictions on free speech. In addition to the arguments in PG&E's Jurisdictional Statement, Sierra Pacific emphasizes that under the First Amendment the state can impose a time, place or manner restriction on speech but only when such restriction is *not* based on content. The PUC's order *is* based on content since it requires the PUC's determination of what serves to educate the public. It is therefore unlawful under *Regan v. Time, Inc.*, 52 U.S.L.W. 5084, 82 L. Ed. 2d 487 (1984).

Moreover, the PUC's order cannot avoid First Amendment limitations on the ground that its speech regulation serves a compelling state interest. The PUC's expressed interest does not qualify as compelling within the meaning given that word by this Court, and even if it did the PUC order is not saved from illegality under the First Amendment because there are narrower and less drastic means by which the PUC can accomplish its interest. *Corsolidated Edison v. Public Service Commission*, 447 U.S. 530 (1980).

I

ARGUMENT

THE PUC'S ORDER VIOLATES THE FIFTH AMENDMENT BECAUSE IT CONSTITUTES AN IMPROPER TAKING OF UTILITY PROPERTY WITHOUT COMPENSATION

A. The Billing Envelope, Including Any Extra Space, Is the Utility's Property

The PUC found that the extra space in PG&E's billing envelope is ratepayer property. App. at A-3. The PUC justified that finding by the following rationale. First, it noted that due to the manner in which the U.S. Postal Service calculates postal rates, the mimimum postage for the bill plus legal notices still leaves extra space in the billing envelope which can be filled without incurring more postage. Second, it declared that the cost of mailing the bill and any required legal notices is paid for by PG&E's ratepayers. Third, it declared that to find that the extra space belongs to the utility would unjustly enrich the utility and simultaneously deprive the ratepayer of the value of the space. *Ergo,* the extra space is ratepayer property. *Id.*

The PUC's analysis and finding are wrong as a matter of law. This Court has consistently held that by paying bills for service, utility customers do not acquire any interest in property purchased by the utility for the conduct of its business. Thus, in *Board of Public Utility Commissioners v. New York Telephone Company*, 271 U.S. 23 (1926) this Court said that "[b]y paying bills for service [customers] do not acquire any interest, legal or equitable, in the property used for their convenience.... Property paid for out of moneys received for service belongs to the company.... Customers pay for service; not for the property used to render it." *Id.* at 32. As the Court stated in *United R. & Electric Co. v. West*, 280 U.S. 234 (1930), ". . . the

property of a public utility, although devoted to the public service and impressed with a public interest is still private property; . . ." *Id.* at 249, *overruled on other grounds, Federal Power Com. v. Hope Nat. Gas Co.*, 320 U.S. 591, 606-607 (1944) (overruling previous decision as to proper method for calculating depreciation).

Consistent with the above decisions, this Court's opinion in *Consolidated Edison v. Public Service Commission*, 447 U.S. 530 (1980) assumes in the course of its First Amendment analysis that utility billing envelopes belong to the utility. *Id.* at 540. In that case, this Court contrasted the defendant's attempted regulation of utility bill inserts with cases where private parties sought to use public property and observed that the utility sought "merely to utilize *its own billing envelopes* to promulgate its views." *Id.* at 539-540 (emphasis added).

This Court's holdings as set forth above are consistent with the economic rationale of utility regulation. The purpose of utility regulation is to provide ratepayers adequate service at reasonable cost. *Morel v. Railroad Commission of California,* 11 Cal. 2d 488, 492 (1938). *See* Priest, *Principles of Public Utility Regulation,* Vol. 1, p. 3 (The Michie Company, 1969), *citing* Cassidy, *Public Utility Regulation in California,* Cal. Pub. Util. Code at 5 (West 1956). A utility provides service in a field affected with a public interest, but it is nevertheless a private company operated with a profit motive for its shareholders. Ratepayers are entitled to adequate service priced low enough to assure that the utility earns no more than a reasonable return on its property. Ratepayers are not entitled to any part of the utility's property. *Board of Public Utility Commissioners v. New York Telephone Company,* 271 U.S. at 32.

No one has questioned that PG&E's use of the mail at minimum first-class postage results in the lowest reasonable

cost of billing for service. It is simply fortuitous that the Postal Service's weight limit for minimum first-class postage creates extra space beyond the weight created by the bill, return envelope and legal notices. Obviously the Postal Service does not tailor its weight limits to coincide with the weight of the utility's bill, return envelope and legal notices.

The existence of extra space does not create a new property right in ratepayers. The utility owns the envelope and the extra space. The ratepayers are entitled to reliable and reasonably priced service, but not to any part of the utility's property.[4]

B. The PUC's Order Constitutes an Improper Taking of the Utility's Property

By its order, the PUC has taken PG&E's property, the extra space in the envelopes, and has given that property to a private third party. In the absence of the PUC order, PG&E could use the extra space for distribution of its publication *Progress*, or for any other purpose it saw fit. Now PG&E must be prepared to give the extra space up to third parties to the extent the PUC may determine.

The Fifth Amendment provides in part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fifth Amendment, through the Fourteenth Amendment, applies to actions by the states, including actions taken by a state through its regulatory agencies. *See generally Chicago. B.&Q.R. Co. v. Chicago,* 166 U.S. 226 (1897). The proper manner for any PUC taking of PG&E's extra space is by condemnation.

[4] The PUC painted itself into a corner. By finding the extra space to be ratepayer property and then regulating the use of that space, the PUC is in an untenable position. The PUC's powers obviously do not extend to the regulation of property belonging to a utility's customers.

The PUC argued that even if the extra space is utility property, its order is reasonable regulation and not a taking, and cites this Court's decision in *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980). App. at A-25. In *Pruneyard,* this Court held that requiring that the owners of a shopping mall allow individuals to circulate petitions in the mall did not constitute an unlawful taking under the Fifth Amendment. 447 U.S. at 83. The PUC failed to recognize that *Pruneyard* involved private property onto which the public was invited daily, a very different situation from the present case. PG&E has never invited TURN or similar interest groups to use space in the utility's billing envelope, and in the proceedings below PG&E actively sought to exclude TURN's use.

This Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), is more closely on point. In *Loretto,* the New York Legislature, to facilitate tenant access to cable television, passed a law requiring landlords to permit cable television companies to install cable television facilities on the landlords' property. *Id.* at 423. This Court held that a permanent physical occupation of property is a taking, and remanded the matter to the state courts to determine the amount of compensation due. *Id.* at 441. The Court emphasized that the taking was a permanent, physical occupation authorized by the government, and declared "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434, 435.

In this case the PUC's order constitutes a permanent, physical taking of the extra space in PG&E's envelopes. As in *Loretto*, the physical occupation of the space in question here is permanent and absolute. *See Loretto,* 458 U.S. at 435 n. 12. Each time PG&E is required to let others use

the extra space in a particular month's billing envelopes the result is a taking: PG&E is forever denied the space in the envelopes mailed containing others' inserts. The extra space owned by PG&E is gone once the space is filled with others' inserts and mailed to the customer. This situation is in stark contrast to *Pruneyard*, where this Court noted that allowing the distribution of leaflets and the solicitation of signatures in the shopping center would not unreasonably impair the value or use of the property. *Pruneyard*, 447 U.S. at 83. Here, however, the value and use of the utility's property is destroyed as soon as the extra space is denied PG&E and given to others. Thus, the PUC's order improperly takes utility property.

C. The Logical Extension Of The PUC's Order Would Result In Disruptive Ratepayer Use Of Utility Property For Almost Any Purpose

Logically extended, the PUC's order would disrupt the use by utilities of their own property to an absurd degree. Each of the following possibilities is an application of the PUC's reasoning:

> (1) A ratepayer organization believes that all-electric kitchens waste energy and wishes to solicit donations to pay for a presentation to the regulatory commission urging an order forbidding such kitchens. It asks the commission to compel the utility to use the "extra space" on its fleet of 5,000 trucks to post signs advocating its views. While the organization agrees to pay for painting the signs on the trucks, it claims the right to use "extra space" on the trucks because ratepayers paid for the trucks. The utility, under the PUC's approach, would be forced to allow the use even if the utility believes that encouraging the widest possible installation of electric appliances is in the ratepayers' best interest.

> (2) A group organized to champion lifeline utility rates wants to use the utility's photocopying machines, when otherwise idle, to copy documents for soliciting funds for the group. The PUC would apparently order the utility to grant the group the right to use the "extra space," as long as the group pays for the paper and electricity utilized and any additional maintenance required. The utility may believe that lifeline needs should be met through taxation rather than subsidization by non-lifeline customers.
>
> (3) A group opposing nuclear power wishes to solicit and maintain records of donations with a view to presenting its position to the PUC. It demands the right to use the utility's computer and telephone system for such purpose when the utility's offices are closed. The utility has previously been authorized by the PUC to build, and has built, nuclear power plants and is selling the power generated therefrom. The PUC would again order the utility to grant the group use of to the "extra space," as long as the group pays any incremental telephone and computer costs associated with the use.
>
> (4) A group championing a rate scheme under which urban telephone rates subsidize rural telephone use wants to hold meetings in a utility's boardroom from time to time when the room is not otherwise in use, to discuss how to present its views to the PUC in rate hearings. The PUC would, under its rationale, consider the unused room capacity "extra space" belonging to the ratepayers, and order the utility to permit the group to use the "extra space," as long as the group pays for any additonal costs arising from such use.

By the PUC's logic, all of the "extra space" belongs to the ratepayers, and could be used by any of them.

These examples illustrate that the intrusion by ratepayer groups upon various kinds of utility property acquired and used to provide service would interfere in varying degrees with the utility's managment of its property. The problem would be magnified whenever several groups with opposing views would compete for use of the "extra space." As this Court has admonished, "[i]t must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership." *Southwestern Bell Tel. Co. v. Public Service Commission*, 262 U.S. 276, 289 (1923).

II

THE PUC'S ORDER VIOLATES THE FIRST AMENDMENT BECAUSE IT IMPERMISSIBLY REGULATES THE CONTENT OF SPEECH AND BECAUSE THE STATE'S INTEREST IS NEITHER COMPELLING NOR PURSUED BY NARROWLY TAILORED MEANS

There are three ways a state permissibly may regulate speech under the First Amendment: (a) by limiting speech to a reasonable time, place, or manner, provided such limiting is not based on content determination; (b) by regulating subject-matter in certain confined categories such as obscenity; and (c) by ordering speech "narrowly tailored" where there is a compelling state interest and where no alternative less drastic means of serving that interest are available. *Consolidated Edison v. Public Service Commission*, 447 U.S. at 535.

In its Jurisdictional Statement, PG&E establishes that the First Amendment protections apply to public utilities, and then correctly argues that PG&E's First Amendment rights are infringed by the PUC's order in at least three

ways: first, by impairing PG&E's right to communicate with its customers; second, by forcing PG&E to carry the messages of a third party and to speak even though PG&E prefers to remain silent; and third, by ensnarling the PUC in improper content analysis of competing messages. *Jurisdictional Statement* at 12. PG&E also argues that the PUC's stated interest in regulating speech is not compelling and the PUC's order is not narrowly tailored to serve its allegedly compelling interest. *Id.* at 23.

Sierra Pacific joins in these arguments. In addition, it elaborates on PG&E's content regulation argument and on its argument that there was no compelling state interest pursued through narrowly tailored means.

A. The PUC's Order Is Not a Valid Time, Place, or Manner Restriction Because It Unconstitutionally Regulates the Content of Speech

The First Amendment is hostile to content-based regulation of speech. *Consolidated Edison v. Public Service Commission*, 447 U.S. at 537. Just last Term this Court reaffirmed that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 52 U.S.L.W. 5084, 82 L. Ed. 2d 487, 494 (1984). This Court's opinion in *Regan v. Time, Inc.* also reaffirmed that time, place, and manner regulations of speech may not be based on the content or subject matter of the message. *Id.* Under the standards reiterated by this Court in *Regan v. Time, Inc.*, the PUC's order unconstitutionally regulates the content of speech.

The PUC maintains that its order is, in effect, a reasonable time, place, or manner restriction that does not require regulation of the content of speech. App. at A-21. According to the PUC, "[t]he proposal does not require the Commission to look at content at all . . . the proposal as we adopt it is neutral as to content of the parties' messages and,

therefore, meets [the] subject matter standard." *Id.* Moreover, the PUC maintains that "[i]t was not our intent then, nor is it now, to involve ourselves in judging the relative merits of the speech of different factions." *Id.* at A-8.

Yet the PUC itself clearly declares its intention to evaluate speech content, notwithstanding its protests to the contrary by stating:

> Should other proposals [for use of the extra space] be brought before us, *we will consider the* feasibility and *benefits of each* at that time. *If we find that these proposals are meritorious*, we could order that extra space be made available for the new program. . . .

Id. at A-19 (emphasis added).

The PUC has already made content-based evaluations of speech. It necessarily made a content-based choice when it approved one of TURN's three proposals, since the PUC in effect certified TURN as a source of education and information to the customers. By the PUC's own admission, it determined that "TURN's proposals are meritorious. Under each proposal, residential ratepayers . . . would be given an opportunity to be informed of and to support, advocacy efforts on their behalf through use of the extra space . . . [w]e believe that this would be an appropriate . . . use of the extra space." *Id.* at A-16.

It made another content-based choice when it ruled that TURN's message deserved inclusion and that PG&E's *Progress* deserved to be excluded from the extra space unless TURN did not use it all. *See* App. at A-53.

Moreover, the PUC's order requires it to make content-based evaluations in the future. If the PUC's order is allowed to stand, numerous groups will no doubt clamor for use of the extra space. Their viewpoints will likely span a wide breadth of opinion on various issues ranging from

elimination of private ownership of public utilities to creation of special rates for particular industries, rates according to value of end use, and the like. The list is potentially limitless.[5]

The PUC's stated purpose for its regulation is to educate consumers in the hope of encouraging their participation in PUC proceedings. In its PG&E decision, the PUC professes that the justification for its regulation is one it set forth in the UCAN decision: to assure "the fullest consumer participation . . . and the *most complete consumer understanding* possible of energy-related issues." *Center for Public Interest Law v. San Diego Gas & Electric Co.*, Decision No. 83-04-020 (Cal. PUC) Apr. 6, 1983) *reprinted in* App. at A-90, A-103 ("UCAN decision") (emphasis added). *See* App. at A-22.[6] When the PUC decides which proposals for use of the extra space are "meritorious" enough to warrant inclusion in the utility's billing envelopes it is thereby deciding which proposals have sufficient educational value for the consumers' "benefit." *See* App. at A-19.

This Court held in *Regan v. Time, Inc.* that it is unconstitutional for the state to make determinations based on

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[5] The PUC's regulation of content in this case is especially troubling because by requiring TURN's materials to be inserted in the billing envelope, those materials enjoy a stamp of legitimacy which would be absent if mailed in a third party envelope. The result is that, through the government's choice of what groups may use a utility's envelopes and for what purpose, the government is in the position of shaping and directing public debate. The PUC has already denied at least one group's request for the use of the extra space. App. at A-157.

[6] The PUC misquoted the UCAN decision in its PG&E decision by deleting the word "consumer." The UCAN decision actually states that assuring "the most complete *consumer* understanding" is the state's goal. *Id.* at A-103 (emphasis added). The PUC's motivation for speech regulation therefore must be its own view on what educates and informs the public.

the educational value of a speaker's message. 52 U.S.L.W. 5084, 82 L. Ed. 2d at 494. In that case, this Court recognized that "[a] determination concerning the newsworthiness or educational value . . . cannot help but be based on the content . . . and the message it delivers. . . . [O]ne will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted in the other is not." *Id.*

The statutory provision held unconstitutional in *Regan v. Time, Inc.* was one allowing certain speech if it was for an educational purpose and disallowing it if it was not. 82 L. Ed. 2d at 492. The PUC admits that it will assess the benefits and merits of proposals for use of the extra space, App. at A-19, and will allow them if they sufficiently serve the state's purpose of educating consumers. As this Court held in *Regan v. Time, Inc.*, such regulations cannot be tolerated under the First Amendment. 82 L. Ed. 2d at 494.

As the government attempted to do in *Regan v. Time, Inc.*, the PUC seeks to allow or disallow particular messages based on the state's assessment of their merit. As in *Regan v. Time, Inc.*, this Court ought not permit the state to regulate speech based on the state's view of what serves to educate the public.

B. The PUC Has Not Shown a Compelling State Interest Pursued by Narrowly Tailored Means Which is Necessary to Justify Its Regulation of Speech

The government can regulate speech without violating First Amendment protections if such regulation is necessary to further or protect a compelling state interest and if there are no narrower and less drastic means to accomplish the government's purpose. *Wooley v. Maynard*, 430 U.S. 705, 715-717 (1977). *See Consolidated Edison v. Public Service Commission*, 447 U.S. at 535.

In this PG&E case, the PUC sets forth the state's interest as that described in its earlier UCAN decision by saying:

> The State interest . . . is the assurance of the fullest possible consumer participation in [PUC] proceedings and the most complete consumer understanding possible of energy-related issues.

App. at A-103. *See* note 6, *supra.*

Sierra Pacific submits that it is impossible to accept this claim of interest as compelling within the meaning given that term by this Court. The PUC's description of the state's interest is extraordinarily broad and vague. Does the PUC really mean "the fullest possible consumer participation" and "the most complete consumer understanding possible,"? Rather than the interest advanced by the PUC, the state's proper interest in this case is delivery of reliable electricity service at reasonable cost. This interest, if properly pursued, in no way requires regulation of speech.

Even if it were accepted that the PUC's asserted interest is compelling, the PUC order is unlawful because there are narrower and less drastic measures available to accomplish the state's purpose of encouraging consumer participation in PUC proceedings and education on energy-related issues. For example, the PUC itself can travel around the state and hold public meetings to educate consumers and solicit interested parties' views. The PUC can award fees and expenses to participants in rate hearings who are otherwise unable to participate. Such awards have already been made to various groups, including TURN, with obvious effect. App. at A-15 n.5. In sum, the PUC has broad powers and unique capabilities to educate and inform the public without infringing First Amendment Rights.

CONCLUSION

Utilities' rights to private property and freedom of speech are well established. The PUC's order in this case infringes PG&E's constitutional rights and, if allowed to stand, will likely provide the impetus for other states' utility regulatory agencies to adopt similar orders. Because the PUC's order violates the First and Fifth Amendments, Sierra Pacific urges this Court to note probable jurisdiction of PG&E's appeal.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF PACIFIC BELL, *ET AL.* IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANT

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QUESTION PRESENTED

Does an order of a state public utilities commission violate the First Amendment of the Constitution of the United States by compelling a privately-owned public utility to include in its monthly billing envelope the messages of a third party?

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No. 84-1044

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Appellant,

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

INTEREST OF THE *AMICI CURIAE*, PACIFIC BELL, *ET AL.*

Pacific Bell is a privately-owned public utility company providing telecommunications services to a majority of the people of the State of California. The telecommunications services it provides and the rates it charges therefor in California are subject to the regulation of the appellee, the Public Utilities Commission of the State of California ("CPUC" or "Commission"), except insofar as that authority may be preempted by the Federal Communications Commission.

As is the case with Pacific Gas & Electric Co. ("PGandE"), complaints have been filed with the Commission seeking to compel Pacific Bell to make available to third parties the use of Pacific Bell's mailings to its customers for their own communications, both additional to and supplanting Pacific Bell's communications. The Pacific Bell cases before the Commission have long since been fully briefed and argued, but no opinion or order has issued from that agency. Obviously, any disposition of this case on its merits will seriously affect the Commission's judgment in the Pacific Bell cases, although there

are constitutional questions raised by Pacific Bell other than the one proferred here by PGandE's jurisdictional statement. As *amici,* of course, we confine ourselves here to the question presented by the appellant, whether the action of the Commission violates the mandates of the Speech and Press Clauses of the First Amendment.

General Telephone Company of California, Southern California Edison Company and Southern California Gas Company, also *amici curiae* here, are the three largest public utility companies in the State of California, with the exceptions of PGandE and Pacific Bell. None of these three utility companies has yet been requested by third parties to use the utilities' mailings for their own communications. But these utilities are regulated by the CPUC and would be subject to any rule validated by this Court, and the outcome of these proceedings will have a significant impact upon their operations.

We have received the written permission of the parties to this case to file this brief *amici* and these have been filed in the office of the Clerk.

ARGUMENT

I. THE ISSUE RAISED BY THE JURISDICTIONAL STATEMENT PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL CONSTITUTIONAL LAW.

The First Amendment question raised by PGandE's jurisdictional statement presents a substantial federal question in two senses. It is substantial because it is of nationwide consequence. The issue has already been raised in many States (Jurisdictional Statement, p. 10), as well as in California, and there is every likelihood that it will arise in every State of the Union with regard to every privately-owned public utility.

The question is substantial, too, because it implicates the most fundamental premises of the Free Speech and Free Press Clauses of the First Amendment. The essence of the First Amendment provisions is that no government in the United States may tell a person what he *must* speak or write. And certainly no government is entitled to inhibit that speech prior to publication. Corporations, including public utilities, are entitled to the protections afforded by the First Amendment. *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U.S. 530 (1980); and *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n,* 447 U.S. 557 (1980). The Commission's order in this case violates these long-accepted and vital commitments to American freedom contained in the Constitution. It requires PGandE to include in PGandE's mailings to its customers messages that are not PGandE's ideas or propositions and, to a large degree, are likely to be antithetical to PGandE's interests and beliefs. It also requires PGandE to limit the use of its own mail to communicate with its customers in order to accommodate the messages of the intervenors. Thus, the Commission both commands PGandE to ventilate views that are not its own and may be alien to it and inhibits it from publishing views that are its own and which it believes to be in the best interests of its consumers and itself.

That these facts raise substantial questions under the First Amendment was acknowledged by the Commission when it first invited an application for the kind of order that it later issued and which is the subject of appeal in this case: "We caution, however, that we will not lightly adopt such an order and that *the considerable First Amendment problems must be fully addressed* in such application." (Jurisdictional Statement, p. 6)

II. PGandE IS A PRIVATELY-OWNED PUBLIC UTILITY REGULATED BY THE CPUC. THE EQUIPMENT AND FACILITIES THAT IT USES TO PERFORM ITS SERVICES OF SUPPLYING GAS AND ELECTRICITY TO CALIFORNIA CONSUMERS BELONG TO PGandE AND NOT TO THE COMMISSION OR THE CONSUMERS OF ITS SERVICES OR THE PUBLIC.

The decision of the Commission is predicated on two erroneous premises: first, that the space in the envelopes in which PGandE mails its bills to its consumers does not belong to PGandE; and second, that the space in the envelopes in which PGandE mails its bills to its consumers constitutes a public forum which the Commission somehow controls in terms of who may use it and when. Both premises are in error. Even if PGandE were publicly owned, the space in the envelopes would not constitute a public forum.

The essence of a public utility is not that it or its property is owned by the public but that it provides products or services which must be made available to all who would purchase them without discrimination. To assure these results, services offered by the utility to the public are subject to the terms, conditions and rates fixed according to due process by the state regulatory agency. Provision of mailing services is nowhere regarded as a public utility function. It is a business that anyone is free to enter or abandon at will, and its prices, terms and conditions are fixed by the open market of buyers and sellers.

Private property may not be commandeered by a State or its agencies except pursuant to the terms of the Fifth Amendment (as applicable to the States through the Fourteenth Amendment), which provides in part: "nor shall private property be taken for public use, without just compensation." Thus, for example, if PGandE were to own an office building in which it housed its business operations, there could be no doubt that the Commission could not order it to turn over office space within that building for the use of such persons as the Commission might designate, however essential the office building might be to the supplying of utility services. It is simply not within a state regulatory commission's jurisdiction to direct a utility to devote its property to, or enter, a private venture such as mailing services. It is the utility-supplying function that the CPUC is authorized to regulate, not the property that is owned by the private corporation.

III. THERE IS NO COMPELLING STATE INTEREST TO BE SERVED BY THE COMMISSION'S TRANSGRESSION OF THE FIRST AMENDMENT RIGHTS OF PGandE.

That the Commission has invaded PGandE's First Amendment rights not to be censored in its speech and not to be compelled to speak what it chooses not to say is evident. The last refuge of the CPUC is that there is an overriding state interest that justifies this destruction of constitutional rights. But the only justification offered by the Commission for its order that both inhibits PGandE from expressing its views and compels it to express the views of third parties is that the Commission wants a plurality of voices to be heard by PGandE customers. It has, however, long since been made clear by this Court that such a rationalization is itself inconsistent with the First Amendment. "[T]he concept that government may

restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo,* 424 U.S. 1, 48-49 (1976). "[T]he implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 254 (1974). The argument of the Commission thus reduces itself to the absurd proposition that the invasion of PGandE's First Amendment rights is justified by what this Court says the First Amendment forbids.

The commercial contents of these mailing envelopes clearly do not make them subject to prescription or proscription, even by the government of the United States which provides the mail services, *Bolger* v. *Youngs Drug Products Corp.,* ____ U.S. ____, 103 S.Ct. 2075, 77 L.Ed.2d 469 (1983), no less by a state public utilities commission, *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U.S. 530 (1980). Since the Commission's avowed objective is to publicize the views of self-appointed consumer advocates under the aegis of a PGandE communication, it fails to meet the first requirement of *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n,* 447 U.S. 557 (1980) that the restraint directly advance a legitimate and substantial state interest. The restraint, at best, only indirectly advances a state interest. *Id.* at 564. It matters not then that the Commission did not and could not show the necessity for this remedy as the most effective and least burdensome method for reaching its goal, as *Central Hudson* demands. *Ibid.* PGandE's mail is clearly not the only way for the intervenors to reach PGandE customers with whatever messages they may have for them. The U.S. mail, print, and electronic media are open to them as well as to anyone else. Pursuant to new legislation, consumer groups will be able to

request attorneys' and expert witness' fees in Commission proceedings. California Public Utilities Code § 1801, *et seq.* (January 1, 1985). Their powers of communication can be fully preserved without destroying PGandE's First Amendment rights.

Were the Commission allowed to succeed in requiring PGandE to carry in its mail the messages of the intervenors, we should indeed be reminded of the words of *Genesis,* xxvii.22: "The voice is Jacob's voice, but the hands are the hands of Esau."

IV. PGandE's ENVELOPES ARE NOT PUBLIC FORUMS AND CANNOT, IN CONSONANCE WITH THE FIRST AMENDMENT, BE COMMANDEERED FOR COMMUNICATIONS OF OTHERS, NOR CAN PGandE BE LIMITED IN ITS USE OF THEM FOR ITS OWN COMMUNICATIONS.

Even if PGandE's property were publicly owned, which it is not, that would not create a right of access to use it by anyone seeking to propagandize or proselytize. The concept of a physical area as a public forum for speech and debate derives from *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496 (1939), where Justice Roberts described the concept in this way:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute but relative, and must be exercised in subordination to the general comfort and convenience, and in

consonance with peace and good order, but it must not, in the guise of regulation, be abridged or denied. *Id.* at 515-16.

The concept of making public areas available for those who wish to use them for purposes of communication has been expanded by this Court to some privately-owned premises which have been opened and committed to public use by the private owners. *See, e.g., Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U.S. 308 (1968), which was qualified or overruled in *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972); *PruneYard Shopping Center* v. *Robins,* 447 U.S. 74 (1980). (The last of these cases has been read by Professor Archibald Cox not as an expansion of speech rights but rather as one "accommodating the law of trespass to modern conditions." *See* Cox, *The Supreme Court, 1979 Term: Foreword: Freedom of Expression in the Burger Court,* 94 Harv. L. Rev. 1, 48 (1980).)

The mere fact of public ownership, even of a medium of communication, does not create the right to its use or the determination of its use by other than its proprietors. Clearly neither the United States Reports nor the Congressional Record need be opened to the expression of views other than those of the Justices in the one case and Congress in the other, although both are publicly owned and certainly arouse a diversity of views among citizen readers and critics. *Cf. Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974); *Perry Educ. Ass'n* v. *Perry Local Educ. Ass'n,* ____ U.S. ____, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983); *Avins* v. *Rutgers, State University of New Jersey,* 385 F.2d 151 (3d Cir. 1967), *cert. denied,* 390 U.S. 920 (1968).

There is certainly no evidence in the jurisprudence of this Court that a State is free to make a public forum for speech out of property that a private owner has never opened to the public

for its use. Reliance on *PruneYard* for that proposition is certainly misplaced. This Court made it clear that the result there was predicated on the fact that the shopping center in question was not reserved for the private use of the owner. 447 U.S. at 87. This had two implications: first, that the speaker was there by the owner's implied invitation; and second, that the space was not subject to being regarded in such a way that all activities conducted thereon would be deemed to have the sanction of the property owner. Certainly there has been no invitation from PGandE to make use of its mail, nor can there be any doubt that the mail sought to be used carries the implied imprimatur of PGandE.

There are two other important distinctions. *PruneYard's* speaker was not selected by the State; consequently, there was no danger of governmental discrimination for or against a particular message. And in *PruneYard,* the Court found that the speaker's use of the shopping center did not substantially interfere with the owner's use of it. There can be no doubt that the Commission will decide which organizations have access to PGand E's mail, nor that the Commission proposes to displace PGandE as well as to install its antagonists' views in that mailing. It was, and presumably remains, this Court's position that a "state in the exercise of its police power may adopt reasonable restrictions on property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provisions." 447 U.S. at 81. Here not only is there a taking of PGandE's property without compensation, there is a clear infringement on PGandE's First Amendment rights as well.

CONCLUSION

Amici curiae, Pacific Bell, *et al.*, respectfully submit that, for the reasons heretofore stated, this Court should note probable jurisdiction on this appeal, set the case for briefing and argument, and reverse the judgment below.

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BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANT

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TURN v. PGandE, Decision No. 83-12-047 (Cal. P.U.C., December 20, 1983) 2

San Diego Gas & Electric Company (SDG&E), with permission of the parties hereto,[1] submits this brief *amicus curiae* in support of the jurisdictional statement filed by Pacific Gas and Electric Company (PGandE or Appellant). SDG&E believes the Court should review the important First Amendment issues raised by Appellant.

INTEREST OF AMICUS CURIAE

SDG&E is a California public utility which is presently under California Public Utilities Commission (Commission) order to insert third-party materials in its billing envelopes.[2] SDG&E was, to its knowledge, the first utility in the United States to be ordered by a state regulatory body to place third-party inserts in its billings. Thus, SDG&E is familiar with the constitutional principles at issue, both in theory and practice. SDG&E believes that this "experiment" has resulted in a serious violation of its First Amendment rights. SDG&E does not choose to voluntarily comply with Commission ordered access and continue to insert third-party messages when the present "experiment" expires in May 1985. Without Court review now, SDG&E anticipates it could very likely be an appellant herein if the Commission is allowed to continue to force access without adequate constitutional scrutiny.

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[1]Written permission from the parties to file this brief as *amicus curiae* has been obtained and filed with the Clerk of this Court.

[2]In *Center for Public Interest Law v. SDG&E*, Decision No. 83-04-020, slip op., (Cal. P.U.C. April 6, 1983), the Commission ordered access to SDG&E bills for a consumer group called Utility Consumer Action Network, Inc. (UCAN) to solicit funds for creation and operation. The access was termed an "experiment" and was ordered for two years, to expire May, 1985. SDG&E did not appeal.

Because of its unique interest and the critical importance of the First Amendment rights at issue, SDG&E is filing this *amicus curiae* in support of the jurisdictional statement of PGandE.

SUMMARY OF ARGUMENT

The jurisdictional statement filed by PGandE presents the important First Amendment issues for consideration. From SDG&E's perspective, the crucial First Amendment violation is that of the state compelling a protected Company to associate with and carry a message against its will. That is the clear and simple constitutional violation which SDG&E believes this Court should review and protect against.

ARGUMENT

The Commission Order[3] directing PGandE to insert third-party messages violates the utility's First Amendment constitutional guarantees.

I.

THE COMMISSION DECISION COMPELS SPEECH IN VIOLATION OF THE FIRST AMENDMENT

This Court has clearly expressed that a utility Company is entitled to First Amendment protection. *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557

[3]*TURN v. PGandE*, Decision No. 83-12-047, slip op., (Cal. P.U.C. December 20, 1983). The Commission, similar to its UCAN decision, granted access four times a year for a period of two years.

(1980). A concomitant protection is the right *not to speak* or associate oneself with the views of others. *Wooley v. Maynard*, 430 U.S. 705 (1977); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The state may not force a person to carry a message against his will. *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974).

In the instant case, PGandE is being forced by the state to carry the message of a third-party. As in *Wooley v. Maynard, supra*, where a state requirement forcing individuals to carry the message "Live Free or Die" on license plates was at issue, Appellant vigorously objects to carrying the third-party messages ordered by the state. This Court explained in the *Wooley* decision that the state's interest "cannot outweigh an individual's First Amendment right to avoid being the courier for such a message." (*supra*, at 717). The state's interest here in allowing fund raising solicitations cannot outweigh the utility's right not to become the courier for the Commission ordered third-party messages.

II.

NO COMPELLING STATE INTEREST IS DEMONSTRATED

In *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980), this Court held that a compelling state interest must be demonstrated before a state may regulate what is included in a utility billing envelope. The record in this case is devoid of the state's demonstration of a compelling interest to restrict PGandE's First Amendment rights. Such an interest is required to be advanced for such state regulation to pass even cursory constitutional scrutiny. *First National Bank of Boston v.*

Bellotti, 435 U.S. 765 (1978). The state must demonstrate such a compelling interest and also must employ means narrowly drawn to avoid unnecessary abridgement of First Amendment rights. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). As PGandE fully articulates in its jurisdictional statement, the state has not demonstrated an interest which passes this constitutional muster.

CONCLUSION

This case presents a fundamental First Amendment issue of first impression. Probable jurisdiction should be noted and the Court should grant consideration of this appeal.

Respectfully submitted,

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No. 84-1044

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

VS.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION,
CONSUMERS UNION,
CONSUMERS FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal From The Supreme Court Of California

BRIEF OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

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QUESTION PRESENTED

Does an order of a state public utilities commission violate the First Amendment of the Constitution of the United States by compelling a privately-owned public utility to include in its monthly billing envelope the messages of a third party?

THE PARTIES TO THIS PROCEEDING

The parties to this proceeding are: (1) Pacific Gas and Electric Company (hereinafter "PGandE" or "appellant"); (2) Public Utilities Commission of the State of California (hereinafter "CPUC" or "commission"); (3) California Association of Utility Shareholders (hereinafter "CAUS"); and (4) Toward Utility Rate Normalization (the real party in interest), Consumers Union, Consumers Federation of California, Common Cause of California, California Public Interest Research Group (collectively referred to hereinafter as "TURN").

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No. 84-1044

In the Supreme Court

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OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
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VS.

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COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal From The Supreme Court Of California

BRIEF OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

OPINIONS BELOW

The denial of the Writ of Review by the Supreme Court of California, which appears in the Appendix to the Jurisdictional Statement (J.S., app., p. 73) is not reported. The opinions of the CPUC dated December 20, 1983, (Dec. No. 83-12-047; J.S., app., p. 1) as modified on May 2, 1984, (Dec. No. 84-05-039; J.S., app., p. 45) are printed in the Appendix to the Jurisdictional Statement and in the Appendix to the Commission's Motion to Dismiss (Commission's M.D., app., pp. 1-56.)

JURISDICTION

This action challenges a decision of the commission, upheld by the Supreme Court of California, which orders appellant against its will to include in its monthly billing envelope the messages of a third party. Appellant appeals on the basis that the order is unconstitutional in that it violates its right of free speech as guaranteed by the First Amendment.

The judgment of the Supreme Court of California, denying appellant's Writ of Review, was entered on October 4, 1984. A Notice of Appeal to this Court was duly filed in the Supreme Court of California on November 5, 1984. The Jurisdictional Statement for this appeal was docketed in the U.S. Supreme Court on December 31, 1984. The jurisdiction of this Court to review this decision is conferred by Title 28, United States Code, Section 1257, subdivision (2). The following decision specifically sustains the jurisdiction of the Court to review the judgment on appeal in this case: *Atchinson Railway Co. v. Public Utilities Comm'n.*[1] *346 U.S. 346 (1953). Probable jurisdiction was noted by the Supreme Court of the United States on March 25, 1985.*

---

[1] *Atchinson Railway* involved an appeal from an order of the Public Utilities Commission of California. The California Supreme Court, as in the present case, denied review; and the appellant appealed to this Court. In deciding the commission's order was equivalent to an act of the legislature for appeal purposes, the Court related:

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section One of the Fourteenth Amendment, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XII, Section 5 of the Constitution of the State of California:

> The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix

---

> We think the Commission's orders must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 U.S.C. § 1257(2) (1948). [Citations omitted] The Commission has construed § 1202 as authorizing these orders. . . . In sustaining the Commission's orders by denying writs of review, the Supreme Court of California upheld the statute as applied by the Commission, and the cases are properly here on appeal. (*Atchinson Railway Co. v. Public Utilities Comm.'n*, 346 U.S. 346, 348-349 (1953).)

Similar to *Atchinson Railway*, here, the commission has construed California constitutional and statutory authority as authorizing it to compel appellant to open its billing envelope to a third party. (Dec. No. 83-12-047; J.S., app., p. 1.)

> just compensation for utility property taken by eminent domain.

Article XII, Section 6 of the Constitution of the State of California:

> The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.

Section 701 of the California Public Utilities Code:

> The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

STATEMENT OF THE CASE

Factual Background

Appellant is regulated by appellee, the Public Utilities Commission of the State of California, which was established pursuant to Article XII of the California Constitution. Charged with the duties and responsibilities that the Legislature has delegated to it in the Public Utilities Code of California, (Cal.Const., art. XII § 5) appellee's primary function is to regulate the rates and quality of services of utilities, including appellant.

A large investor-owned, combined gas and electric utilities, appellant, incorporated in 1905, serves 48 of California's 58 counties (electric-47, gas-37). 3.6 million electric customers and 2.9 million gas customers receive service from appellant who has a responsibility to communicate with these customers on numerous matters, including appellant's ability to provide reliable and efficient service.

As a necessary adjunct to providing utility service, appellant, since December 1923, has published a monthly newsletter called

PGandE Progress (*Progress*).[2] This publication is appellant's primary means of communicating with its customers. Through *Progress*, conservation messages and suggestions are conveyed, rate changes explained, and questions of general concern are answered. In addition, *Progress* occasionally carries articles that are unrelated to appellant's business, but are of general public interest. (See J.S. app., pp. 183-190.)

Progress is currently circulated to 3.7 million households. It is mailed each month to customers in the billing envelope at no additional cost to ratepayers. The cost of printing *Progress* is borne by stockholders and is not one of the estimated costs used to calculate rates.

Under existing United States postal regulations, a bill must be sent by first-class mail at a cost of sixteen and one-half (16.5¢) to seventeen (17¢) cents.[3] For this cost, which is the minimum first-class rate, up to one ounce of material may be included in the envelope. A bill, even though weighing less than one ounce, cannot be mailed for less than the first-class rate.

Included with each mailing is the bill itself, the envelope in which it is mailed to the customer, a self-addressed return envelope in which the customer can return payment to PGandE, and an occasional legal notice. Because these items weigh less than one ounce, appellant for the last sixty (60) years, has included *Progress* in its billing envelope without incurring any additional costs.

Proceedings Below

The present case has its origin in appellant's 1982 general rate case, Application No. 60153, et al. (J.S., app., p. 63.) In that proceeding, Toward Utility Rate Normalization (TURN), a

[2] A recent edition of *Progress* is included in the appendix to the Jurisdictional Statement (J.S., app., p. 183).

[3] The 17 cent postage charge applies to mail that is presorted by six digit zip code. The 16.5 cent postage charge applies to mail presorted by nine digit zip code.

frequent intervenor in appellant's rate proceedings, contended that PGandE had violated 16 United States Code section 2623, subsection (b)(5) and 16 United States Code section 2625, subsection (h) of the Public Utility Regulatory Policy Act (PURPA) by including political communications in its billing envelope and in the envelope used to mail dividends to appellant's shareholders. (J.S., app., p. 64.)

In Decision No. 93887, 7 Cal. P.U.C. 2d 349 (1981) modified by Decision No. 82-03-047, 7 Cal. P.U.C. 2d 349 (1982)[4] the commission found that from time to time *Progress* contained items that could be considered political comment. (*Id.*; J.S., app., pp. 64-65.) The CPUC, although recognizing that *Progress* is printed at shareholder's expense and is sent in the envelope without additional cost to the ratepayers, nevertheless concluded that there are or may be many other uses for the "extra space."[5] Since *Progress* is sent in the billing envelope, the commission decided that the ratepayers lose the "opportunity cost" of using the envelope. (Dec. No. 93887; J.S., app., p. 68.) In findings of fact number 58, the commission held that the "extra space" in the envelope "is properly considered as ratepayer property." (*Id.*; J.S., app., p. 72.)

The CPUC then examined how the "extra" space could be used more efficiently so ratepayers could realize this "opportunity cost." It considered: (1) banning *Progress*; (2) establishing a "public access mechanism" requiring the utility to allow TURN or other groups to reply to political messages; (3) charging PGandE a fee for use of the "extra" space whenever PGandE engaged in political speech; or (4) auctioning off the "extra"

[4] The pertinent portions of Dec. No. 93887 are reprinted in the Appendix to the Jurisdictional Statement. (J.S., app., p. 63.)

[5] Specifically, the commission defined:

> 'extra space' as the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would result in any additional postage cost. (Dec. No. 83-12-047; J.S., app., p. 3.)

space to the "highest reputable commercial advertiser." (*Id.*; J.S., app., pp. 66-71.) The commission did not, however, choose any of these "solutions." [6] Rather it invited:

> . . . TURN or any other interested party to file an application with this Commission with a proposed solution to the 'extra' space problem. *The application would seek an order from us to the utilities, such as PGandE, that they utilize the economic value of the 'extra space' more efficiently for ratepayers' benefit.* We caution, however, that we will not lightly adopt such an order that *the considerable First Amendment problems must be fully addressed* in such application. (*Id.*; J.S., app., p. 71.) (emphasis added).

On May 31, TURN filed a complaint with the CPUC (Docket No. 83-05-13; J.S., app., p. 75) requesting access to appellant's billing envelope no fewer than four times per year for a two-year period for the purpose of including a "Consumer Advocacy Checkoff" proposal for a financial solicitation.[7] The "Consumer

[6] Shortly after issuing Decision No. 93887, the commission granted a request to use the "extra space" in the billing envelopes of San Diego Gas and Electric Company (SDG&E) to solicit funds and create a consumer group to be called the San Diego Utility Consumers Action Network, Inc. (UCAN). (*Center For Public Interest Law v. SDG&E*, Decision No. 83-04-020, ___ Cal. P.U.C. 2d ___ (1983), J.S., app., p. 90; (hereinafter the "UCAN Decision").)

In reaching its decision in the UCAN case, the commission stated that the right involved is not so much a "traditional property right as an equity right." (J.S., app., p. 100.) Although stating that not everything paid for with ratepayer money is the sole property of the ratepayer, the commission did not give any guidance as to which payments give the ratepayers an equity interest in utility property and which do not. (J.S., app., p. 100.)

[7] TURN proposed three types of checkoff alternatives. The first two require the listing of various qualified consumer organizations. The main difference in the first two alternatives is the manner in which the qualified organizations are selected. The third alternative is less in the nature of a "checkoff." Under this alternative, only TURN is allowed to solicit funds. (J.S., app., pp. 85-86.)

Advocacy Checkoff" proposal was open *only* to qualified organizations representing residential customers, and any funds so acquired would have to be used in PGandE proceedings. (*Id.*; J.S., app., p. 82.) On August 8, 1983, appellant filed its motion to dismiss TURN's complaint contending, *inter alia*, that the requested relief was unconstitutional because it would violate appellant's rights protected by the First, Fifth and Fourteenth Amendments to the United States Constitution. The motion was denied. (Dec. No. 83-12-047; J.S., app., p. 9.)

On December 20, 1983, by a 4 to 1 vote, the commission issued Decision No. 83-12-047 (J.S., app., p. 1) declining to adopt two of TURN's Consumer Advocacy Checkoff proposals, but granting TURN access to appellant's billing envelope four times per year for a two-year period.[8] During such time, TURN's message must be accorded a priority position over *Progress*. (Dec. No. 84-05-039; J.S., app., p. 51.)

Decision No. 83-12-047 attempts to explain more clearly the commission's ephemeral view of the ratepayer's interest in the extra space in the billing envelope. First, the commission stated that it had not really held that the billing envelope itself is ratepayer property. (Dec. No. 83-12-047; J.S., app., pp. 3-4.) Rather, it surmised that the extra space in the envelope is more like an "artifact generated with ratepayer funds" (*Id.*; J.S., app., p. 3) which has economic value. Then, modifying this statement it said "the extra space is a by-product of the billing process which is paid for by ratepayers." (Dec. No. 84-05-039; J.S., app., p. 52.) And, to prevent appellent from benefitting from the extra space, reasoned the commission, as a matter of equity, it "is properly considered as ratepayer property." (*Id.*; J.S., app., p. 3.) Moreover, continued the commission, because of its past practice of requiring utilities to send legal, conservation, tax and rate notices in the billing envelopes it, therefore, had jurisdiction over the envelope extra space. (*Id.*; J.S., app., p. 47.) Specifically, the

[8] The commission found that it would be premature to adopt the "checkoff" proposals since only TURN had sought access to the PGandE billing envelope. (Dec. No. 83-12-047; J.S., app., p. 17.)

commission construed Article XII, Sections 5 and 6 of the California Constitution and California Public Utilites Code Section 701 as the constitutional and statutory authority for its order. (*Id.*; J.S., app., pp. 26-27; see also, Commission's M.D., app., pp. 57-59.)

Then, relying on its UCAN decision, the commission summarily rejected PGandE's First Amendment claims[9] and held that its action was a valid time, place and manner restriction, that the space belongs to the ratepayers and that its order was a narrowly-tailored means of serving the compelling state interest identified in the UCAN proceeding. (Dec. No. 83-12-047; J.S., app., pp. 20-22.) Asserting that the envelope space is the ratepayers' property, not PGandE's, the commission dismissed the Fifth Amendment taking issue. (*Id.*; J.S., app., p. 27.)

Applications for rehearing were filed by appellant and a number of other interested parties. On March 7, 1984, the commission issued Decision No. 84-03-045 (J.S., app., p. 62), extending its stay of the effectiveness of Decision No. 83-12-047. Thereafter, on May 2, 1984, by a 3-2 vote, the CPUC issued Decision No. 84-05-039 modifying Decision No. 83-12-047 and denying the requests for a new hearing. On June 4, 1984, Appellant filed its Petition For Writ of Review with the Supreme Court of California challenging the constitutionality of the order. On October 4,

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[9] Decision Numbers 83-12-047 (J.S., app., pp. 1-44) and 84-05-039 (J.S., app., pp. 45-61) are rife with references to the UCAN Decision. For example, Decision No. 83-12-047 adopts the so-called "compelling state interest" from the UCAN Decision. (Dec. No. 83-12-047; J.S., app., p. 22.) Decision No. 84-05-039 also quotes extensively from the UCAN Decision. This was done even though the commission specifically rejected requests for interventions in the UCAN proceeding by various utilities which alleged that the decision might affect them. The commission assured the utilities that the complaint would "in no way affect[ ] the rights and duties of other utilities." (Dec. No. 83-04-020; J.S., app., p. 96.) Despite this assurance, the commission used the UCAN decision as the primary basis for giving TURN access to appellant's billing envelope.

1984, the Supreme Court of California denied, without comment, appellant's Petition for Writ of Review. (J.S., app., p. 73.)

SUMMARY OF ARGUMENT

The decision below, compelling appellant to publish in its monthly billing envelope the messages of TURN, is not only repugnant, but strikes at the foundation upon which the First Amendment rests. It is well established that a state cannot compel a person to carry a message against his or her will. (*Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *Wooley v. Maynard,* 430 U.S. 705 (1977).) The right to refrain from speaking and from associating with the messages of others is an essential part of the First Amendment. (*Abood v. Detroit Board of Education,* 431 U.S. 209 (1977).) A utility, like other corporations, has a First Amendment right to exercise judgment as to the materials to be included in "its own billing envelopes." (*Consolidated Edison Co. v. Public Service Comm'n.,* 447 U.S. 530, 540 (1980).) And, when government seeks to regulate that right, its "action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." (*Id.*) First Amendment principles cannot be evaded, as done below, by a state's ruling that the extra envelope space does not belong to PGandE, but rather to customers because they purchase that space when they pay their utility bills. Contrary to this ruling, customers do not pay for the property used to render service. (*Board of Public Utility Comm'rs. v. New York Telephone Co.*, 271 U.S. 23, 32 (1926).)

Even commercial speech of a utility falls within the protection of the First Amendment. (*Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557 (1980).) In *Central Hudson*, the Court held that the "State must assert a substantial interest" (*Id.* at 564) before it may regulate utility speech, and that "the regulatory technique must be in proportion to that interest." (*Id.*) Forcing appellant to communicate messages, which it chooses not to communicate, meets neither the *Consolidated Edison* nor the *Central Hudson* test. Whatever interest the State may have in regulating utility rates and services, that

interest cannot be legitimately pursued by mandating PGandE to communicate TURN's messages in its billing envelopes. (See *Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. at 540.)

Any governmental intrusions into the sensitive area of speech activity will have a "deterrent effect on the exercise of First Amendment rights . . . not [necessarily] through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . . ." *Buckley v. Valeo*, 424 U.S. 1, 65 (1976). To guard against governmental intrusions into these fragile areas, "[e]xacting scrutiny is necessary whether or not the regulation is intended to limit the exercise of freedom of expression." (*Id.* at 23; see also, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981).) By mandating PGandE to publish TURN's messages, the State has chosen a most drastic method for achieving its alleged interests. The chosen method not only infringes appellant's speech, but also puts the government in the business of picking and choosing speakers whose messages it will then require appellant to publish in its billing envelope.

The issue, therefore, before this Court is whether a state may, consistent with the First Amendment, force a privately-owned public utility to include in its monthly billing envelope the messages of a third party.

ARGUMENT

I

COMPELLING APPELLANT TO PUBLISH MESSAGES OF A THIRD PARTY IS UNCONSTITUTIONAL

A. Utilities Are Protected by the First Amendment

Restrictions placed upon corporate speech must pass constitutional muster. The First and Fourteenth Amendments guarantee that no State shall "abridg[e] the freedom of speech." (*Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500-501 (1952).) In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978), the Court put to rest the idea that corporations are not entitled to

free speech. *Bellotti* was specifically applied to utilities in *Consolidated Edison* which held that utilities, like banks and other corporations, are protected by the First Amendment:

> The restriction on bill inserts cannot be upheld on the ground that *Consolidated Edison* is not entitled to freedom of speech. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), we rejected the contention that a State may confine corporate speech to specified issues. That decision recognized that *'[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon* the *identity of its source, whether corporation, association, union, or individual.'* [citation omitted] (*Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. at 533.) (emphasis added).

B. The Decision Below Takes From Appellant Its First Amendment Right to Select the Content of Its Billing Envelopes.

For over half a century, PGandE has exercised discretion in selecting the content of its billing envelope. Through the billing envelope, appellant has distributed its monthly newsletter, *Progress*, which, *inter alia*, conveys conservation messages, explains rate changes, and responds to customers' general concerns.

The communications in *Progress* are precisely the type of communications that are protected by the First Amendment. (*Consolidated Edison Co.* v. *Public Service Comm'n.*, 447 U.S. 530.) Some articles in *Progress*, although intended to inform PGandE customers of various aspects of the energy picture, might be classified by some as "commercial" speech, but most articles are noncommercial. Regardless of how the contents of *Progress* are classified, it is nevertheless speech that falls within the ambit of the protection of the First Amendment. (See e.g., *Consolidated Edison Co.* v. *Public Service Comm'n.*, 447 U.S. at 533; *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n.*, 447 U.S. at 561; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976).)

Initially, the commission completely barred PGandE from using its billing envelope four times per year (Dec. No. 83-12-047; J.S., app., p. 17); but on rehearing, it modified its decision so that "PG&E will be permitted to continue to insert the *Progress* during the remaining eight months and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted." (Dec. No. 84-05-039; J.S., app., p. 51.) This concession is illusory because TURN is given the first opportunity to choose which months it wants to preempt the billing envelope. And, whether or not PGandE will be able to speak to its customers at all during those four months will hinge entirely upon TURN and its decision as to the length of its message, or the weight of paper that it uses. Commissioner Bagley, in his dissent, correctly observed:

> And now under the revised order TURN can determine, *solely by its choice of paper weight, whether or not and if so how much material may be inserted in the envelope by defendant's management on behalf of the shareholder.* [citation omitted] Under this order we have the unseemly situation where *government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other.* That, compared to government proscription, is deprivation squared. (Dec. No. 84-04-039; J.S., app., pp. 59-60 (Bagley, dissenting).) (emphasis added).

As recognized by Commissioner Bagley, Decision No. 83-12-047 not only requires PGandE to carry TURN's message, but also severely restricts PGandE's ability to select the content of the billing envelope sent to its customers.[10] And, more importantly, it places that right in the hands of government. Professor Emerson has strongly warned that "governmental entanglement with the system of expression . . . is certain to end in severe repression of

[10] To this argument, the commission replies: "To the extent that the proposal as adopted restricts PG&E's use of the extra space, it does so on the grounds that the space belongs to the ratepayers and that this restriction is made pursuant to our overall regulatory authority, not on the basis of content." (Dec. No. 84-05-039; J.S., app., p. 51.)

communication." Emerson, *Legal Foundation of the Right to Know,* (1976) *Wash. U. L. Q.* 1, 13. The decision below not only takes from appellant its right to select the contents of its billing envelope, but also ensnarls government in selecting competing speakers for the envelope, thereby making government the ultimate arbitrator of what is communicated. (See discussion, *infra,* pp. 22-27.)

C. The First Amendment Prohibits Government From Compelling Speech and Association.

The guarantee of freedom of expression includes both the right to refrain from speaking and the concomitant right not to be associated with the speech of others. A compulsion to speak raises the same First Amendment issues as does a direct ban on speech. In *Wooley v. Maynard,* 430 U.S. at 714 this Court explained:

> We begin with the proposition that the right of freedom of thought . . . includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts. *The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'* [citation omitted] (emphasis added).

The issue in *Wooley* was whether the State of New Hampshire could force the appellees (The Maynards) to display the State's message, "Live Free or Die," (*Id.* at 707) on their car's license plate. Like PGandE, the Maynards in *Wooley* objected vigorously to carrying someone else's message.[11] Relying on *Board of Education* v. *Barnette,* 319 U.S. 624 (1943), which held unconstitutional a statute requiring public school students to participate in

[11] By requiring PGandE to send its bill and TURN's message together, the commission has given TURN's message a status it cannot achieve on its own. Sent by itself, TURN's solicitation would be easily identified and quickly discarded or kept based on its own identily. The recipient of appellant's billing envelope, however, will peruse its contents

daily public ceremonies by honoring the flag with words and traditional gestures, the *Wooley* Court said that the "New Hampshire statute in effect requires that [the Maynards] use their private property as a 'mobile billboard' for the State's ideological message . . . . " (*Wooley v. Maynard,* 430 U.S. at 715.) Similarly, the decision below compels PGandE to use its property to communicate TURN's messages in disregard of its right "to refuse to foster, in any way . . . an idea [it] find[s] . . . objectionable."[12] (*Id.*)

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precisely because PGandE is sending the bill in it. After receiving a number of such solicitations, the customer may come to expect the envelope to contain third party solicitations and will act accordingly. Consequently, PGandE's messages may suffer irreparably from the forced association.

Recognizing the value of associating TURN's message with PGandE's envelope, the commission admitted that there is an "increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately." (Dec. No. 83-12-047; J.S., app., p. 3., n. 2.) But, even the "increased probability" that customers may read TURN's insert if put in PGandE's envelope is not sufficient justification to abridge PGandE's First Amendment rights. A similar argument in *City Council of Los Angeles v. Taxpayers for Vincent,* ____U.S. ___, 104 Sup.Ct. 2118, 2133 (1984), that "posting signs on {utility] property has advantages over [other] forms of expression" was rejected as an insufficient basis for allowing candidates for political office to place their signs on the City's utility poles.

[12] The State has gone one step further here than in *Wooley* by ordering appellant not to carry the State's message, but rather to carry that of a private entity (TURN). Even if appellant's property were publicly owned, which it is not, that fact would not create a right of access.

The commission's claim that a right of access is permissible as a regulation of a nonpublic forum (Commission's M.D., p. 20) is without merit. *Perry Educational Association v. Perry Local Educators Ass'n,* 460 U.S. 37 (1983), cited for this proposition, lends no support. Justice White, writing for the Court, distinguished the grant of access in *Perry,* which involved government property, from the right of access to a utility's billing envelope. "Indeed, in *Consolidated Edison,* which concerned a utility's right to use its own billing envelopes for speech

Abood v. Detroit Board Of Education, supra, 431 U.S. 209 is also applicable. It invalidated a state law permitting public agencies to require that contributions be made to union political activities as a condition of employment. The fact that the employees in *Abood* were compelled to contribute and associate, said the Court, rather than prohibited from contributing for political purposes, worked no less an infringement on their associational freedom. (*Id.* at 234-235.) The State cannot intrude into "the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control." (*Board of Education v. Barnette,* 319 U.S. at 642.)

Associational freedom is essential to the First Amendment " . . . whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . . " (*NAACP v. Alabama,* 357 U.S. 449, 460 (1958).) PGandE, like the school teachers in *Abood* is entitled to the associational protection of the First Amendment, "because [it too] has been prohibited, not from actively associating, but rather from refusing to associate." (*Abood v. Detroit Board of Education,* 431 U.S. at 234) This violates PGandE's associational freedom. (See *United States v. Robel,* 389 U.S. 258, 265-266 (1967).)

Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 254 rejected the idea that a state may compel a newspaper to publish the message of a third party. In *Miami Herald,* a Florida statute required newspapers to grant a right of reply to press criticisms of a candidate for nomination or election. The Court specifically repudiated the government's argument that it had a compelling interest in enforcing a right of access in order to enhance a variety of viewpoints. Chief Justice Burger, writing for the Court, observed:

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purposes, the Court expressly distinguished our public forum cases, stating that '*the special interest of a government in overseeing the use of its property' were not implicated.*" (460 U.S. at 49, n. 9.) (emphasis added). Here, TURN seeks not to utilize government property, but rather that of a private property owner. Thus, *Perry* is of no avail.

> However much validity may be found in these arguments, at each point, the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years. (*Id.* at 254.)

Almost thirty years before *Miami Herald* was decided, the Court, in *Associated Press v. United States,* 326 U.S. 1(1945), "foresaw the problems relating to government-enforced access." (*Miami Herald Publishing Co. v. Tornillo,* 418 U.S. at 254.) *Associated Press* intimated that a person should not be compelled to publish that which reason tells him or her not to publish. (326 U.S. at 20, n.18.) Here, the same principle applies because the government-enforced right of access is specifically predicated on governmental officials compelling PGandE against its will to publish[13] the messages of speakers selected by the government. This brings about a clear confrontation with appellant's right not to speak and associate.

In *Miami Herald* the right to refrain from speaking, and indirectly the right not to associate, was at issue. The Court recognized, as it must here, that the "[a]ppellees argument that the Florida statute [did] not amount to a restriction of appellant's right to speak because 'the statute in question [had] not prevented the *Miami Herald* from saying anything it wished' [citation omitted] begs the core question." (418 U.S. at 256.) The answer to that core question applies equally here:

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[13] The commission maintains incorrectly that it is not ordering PGandE "to publish" TURN's message, but rather is merely allowing TURN to use the available space in the billing envelope. (Dec. No. 83-12-047; J.S., app., p.23) This view of "publishing" is inconsistent with law. Black's Law Dictionary, Fourth Edition, defines "publish" as: "to make public; to circulate; to make known to people in general." And, in *Western States Newspapers, Inc. v. Gehringer,* 203 Cal.App.2d 793, 797-798, 22 Cal. Rptr. 144, 147 (1962), to publish was held to mean "to disclose, reveal, proclaim, circulate or make public."

> Compelling editors or publishers to publish that which 'reason tells them should not be published' is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specific matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. [citation omitted] (418 U.S. at 256.)

Similarly, compelling PGandE to publish or distribute materials selected or printed by TURN operates in much the same manner as telling PGandE what it can and cannot publish or distribute. (*Id.*) It takes from appellant not only its right to refuse to publish or associate with the messages of others, but also places an "affirmative duty upon" (*Wooley v. Maynard,* 430 U.S. at 714) appellant to publish and to associate with others. The crux, however, of the *Wooley* decision, which relied on *Miami Herald,* was that the state's interest in displaying the state's slogan, there, no matter how acceptable to some, could not "outweigh an individual's First Amendment right to avoid becoming the courier of such message." (*Id.* at 717.) Thus, the State's alleged interest here in providing TURN with an adequate fund raising mechanism cannot outweigh PGandE's right to refuse to become the "courier" of TURN's messages.

Nor does the Court's decision in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980) offer support for the commission's decision. The issue in *PruneYard* was "whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner's" (*Id.* at 76) protected rights. Upholding the right to petition at the shopping center, the Court observed, "The PruneYard is a large commercial complex that covers several city blocks, contains numerous, separate business establishments, and is open to the public at large." (*Id.* at 83.)

Rejecting the shopping center owner's argument that he had a "First Amendment right not to be forced by the state to use his property as a forum for the speech of others," (*Id.* at 85) the

Court, distinguishing *Wooley*, noted that "the shopping center by choice of its owner" (*Id.* at 87) is "a business establishment that is open to the public to come and go as they please." (*Id.*) Most importantly, continued the Court, "the views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner." (*Id.*) Unlike in the instant case, there was no likelihood in *PruneYard* that the messages of petitioners at a shopping mall would be confused with those of the mall's owner.

But, here, in contrast to the shopping center in *PruneYard*, which covered approximately 21 acres and could accommodate all speakers, there are significant problems inherent in forcing PGandE to put TURN's messages in the limited space of its billing envelopes.[14] The PruneYard Shopping Center is clearly

[14] The decision below places appellant in a dilemma. This was acknowledged by the commission in decision No. 93887:

> *We [commission] also are concerned* that we do not have in place a fair mechanism for determining just who should be allowed to respond to PG&E. Should it be TURN? California Retailers Association? Citizen Action League? *Perhaps we should allow for a lottery to determine such opportunity . . . However, we think this would simply result in chaos and confusion. (Id.;* J.S., app., p. 70.) (emphasis added).

California courts have held that, under the California Constitution, if one party is granted access to private property, then all other parties similarly situated also must be granted that same right of access. In *Laguna Publishing Co. v. Golden Rain Foundation*, 131 Cal.App.3d 816, 182 Cal. Rptr. 813 (1982), the court faced the issue whether the private residential community of Leisure World could allow one newspaper in and keep out all other similar papers. Holding such discrimination to be impermissible, the court stated:

> In other words, Golden Rain, *in the proper exercise of its private property rights, may certainly choose to exclude all* give-away, unsolicited newspapers from Leisure World, *but once it chooses to admit one . . . then the discriminatory exclusion of another such newspaper represents an abridgement of the free speech, free press rights of the excluded newspapers secured under our state Constitution. (Id.* at 843, 182 Cal. Rptr. at 829.) (emphasis added).

distinguishable from a billing envelope. It is a huge place where everybody can congregate without interfering with the rights of the owners. This was recognized by the *PruneYard* Court. (*Id.* at 83.) Moreover, unlike a billing envelope, a shopping center is a place where all who wish to come and bring their pamphlets and leaflets can do so without governmental selection of the speakers and without the public thinking that the messages communicated reflect the views of the shopping mall's owner. In the present case, one speaker, TURN, is singled out by the state to present its views. It is highly likely that the public will receive a mistaken impression that the State's selection of TURN to send its message in the billing envelope is supported by PGandE. Even a disclaimer, as proposed by the commission (J.S. app., P. 23), would not remove this impression. Rather, a disclaimer would force PGandE to speak even though it prefers to remain silent.

In *PruneYard* a disclaimer was irrelevant because no one would think speakers at a shopping mall reflect the views of the owners of the mall. The instant case is analogous to *Wooley*. A disclaimer on the Maynards' license plates in *Wooley* would not have made permissible the forced association of the Maynards' with the State's message they found objectionable. Like the Maynards, PGandE is also being required "to be an instrument for fostering public adherence to an ideological point of view [it] finds unacceptable." (*Wooley v. Maynard*, 430 U.S. at 715.) A disclaimer on TURN's messages cannot remove this serious infringement upon personal liberties. (*Id.*) As stated by Justice Powell, a forced right of access takes away a person's right to refrain from speaking:

> The property owner or proprietor would be faced with a choice: he either could permit his customers to receive a

Accordingly, other groups who may wish to send their messages through PGandE's billing envelope would be entitled to equal consideration under California law. (See also, *U. C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory*, 154 Cal.App.3d 1157, ____ Cal. Rptr. ____ (1984).) This would force a steady, if not complete, erosion of the space available for appellant's messages.

> mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he has been forced to speak when he would prefer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues. *The mere fact that he is free to dissociate himself from the views expressed on his property,* [citation omitted], *cannot restore his 'right to refrain from speaking at all.'* [citation omitted] (*Id.* at 99.) (emphasis added).

To be sure, a utility's less than one ounce billing envelope is not comparable to a large shopping center, which is unique and which "by choice of its owners is not limited to their personal use."[15] (*Id.* at 87) Moreover, a shopping center can accommodate thousands of different speakers without governmental entanglement in selecting the speakers. By contrast, the limited space in appellant's billing envelopes, which has always been limited to PGandE's private use and occasional legal notices, cannot accommodate outside speakers without governmental entanglement in selecting the speakers.

D. Permissible Time, Place or Manner Restrictions Do Not Empower a State to Force a Utility to Communicate the Messages of Third Parties.

The commission concluded that forcing PGandE to speak and to associate with TURN's message through the billing envelope was a permissible time, place and manner regulation. (Dec. No.

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[15] Justice Rhenquist, writing for the Court, stressed this factor:
> It bears repeated emphasis that we do not have under consideration the property or privacy rights of an indiviudal homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center]. A handful of additional orderly persons soliciting signatures and distributing handbills . . . would not markedly dilute defendant's property rights. (447 U.S. at 78.)

83-12-047; J.S., app., pp. 20-21.) In reaching this conclusion, it relied on language from *Consolidated Edison Co. v. New York Public Service Comm'n.,* 447 U.S. at 535, where this Court recognized " ' . . . the validity or reasonable time, place or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication' " (Dec. No. 83-12-047; J.S., app., p. 20). The commission's reliance, however, on *Consolidated Edison,* is totally misplaced. Time, place or manner restrictions apply only when regulating an already existing, independent right to exercise protected rights. (See *Cox v. New Hampshire,* 312 U.S. 569 (1941).) For example, if a person already has a right to exercise First Amendment privileges on a public sidewalk, that right can be limited so as not to obstruct or unreasonably interfere with the sidewalk or at a time that will not materially affect the normal business conducted there. (See *Grayned v. City of Rockford,* 408 U.S. 104 (1972).)

Under the commission's rationale, both *Wooley v. Maynard, supra,* 430 U.S. 705, and *Miami Herald Publishing Co. v. Tornillo, supra,* 418 U.S. 241, could have been required to carry third party messages by a mere reliance upon time, place or manner restrictions. New Hampshire, for example, could have resolved the *Wooley* case by using time, place or manner restrictions to require the Maynards to carry the State's slogan on their car's license plate; and Florida could have compelled the Miami Herald to publish reply messages as a time, place or manner restriction. Yet, neither of these cases discussed the doctrine and properly so. For, it is preposterous to argue, as the commission argues, that such restrictions create a forced right of access to the property of others.

Consolidated Edison soundly rejected New York's use of time, place or manner restrictions as a basis for limiting a utility's use of its own billing envelope. As stated in *Consolidated Edison,* "the essence of time, place or manner regulations lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what the message, a roving sound truck that blares at 2 a.m. disturbs neighborhood tranquility." (*Consolidated Edison Co. v. Public*

Service Comm'n., 447 U.S. at 536.) In other words, time, place or manner restrictions are applied to ensure that First Amendment rights are exercised reasonably so as not to interfere with the rights of others.

The commission's unsupported claim that compelling PGandE to carry TURN's message "would be a 'reasonable time, place or manner' restriction in that it requires PGandE to share the extra space with TURN for a purpose which significantly benefits ratepayers" (Dec. No. 84-05-039; J.S., app., p. 51) is not only illogical, but is similar to the argument made in *Consolidated Edison* to justify New York's "ban [of utility speech] on the grounds that consumers will benefit from receiving 'useful' information. . . ." (447 U.S. at 537.) Rejecting New York's use of such restrictions to justify an infringement of First Amendment rights, the Court observed: "The [New York] Commission's own rationale demonstrates that its action cannot be upheld as a . . . time, place or manner regulation." (*Id.*) Likewise, the decision below cannot be upheld as a permissible time, place or manner restriction.

E. In Reaching Its Conclusion as to the Most Efficient Use of the Envelope Extra Space the Commission Unlawfully Evaluated the Content of Speech.

The traditional view of the First Amendment is that it serves as a shield against the power of government to regulate the content or means of communication. First Amendment analysis starts with the proposition that communication is presumptively protected from governmental interference. (See L. Tribe, *American Constitutional Law* § 12-2 at p. 581 (1978).) Governmental neutrality toward communicators and the content of their communications is considered a "paramount obligation." (E.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, (1976) (Stevens, J., plurality); see also, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 776 (Stewart, J., concurring).)

In the commission's view, its decision does "not require [it] to look at content at all" (Dec. No. 83-12-047; J.S., app., p. 21), but

a review of the decision refutes this claim. The avowed purpose of the proceeding below was to determine "how to use the economic value of the extra space more efficiently for ratepayers' benefit." (Dec. No. 83-12-047; J.S., app., p. 21; see also, Dec. No. 93887; J.S., app., pp. 68-70.) Measuring that efficiency, to be sure, requires content analysis:

> Our goal, as expressed in D. 93887, is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. *It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E.* (*Id.;* J.S., app., p. 17.) (emphasis added).

Without evaluating content, how could the commission determine that publishing TURN's messages would be more beneficial than PGandE's use of the envelope extra space?[16] To reach its conclusion, the commission either had to weigh the value of TURN's speech against PGandE's speech, or to make an unsupported determination that TURN's messages would be a more efficient use of the envelope extra space. In either case, the commission's action was impermissible. If the commission

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[16] Not only did the commission evaluate the content of speech, it will continue to do so:

> The adoption of this proposal in no way precludes other proposals from being considered. Should other proposals be brought before us, *we will consider the feasibility and benefits of each at that time. If we find that these proposals are meritorious, we could order that extra space be made available for the new programs* along with any previously authorized ones. (Dec. No. 83-12-047; J.S., app., p. 19.) (emphasis added).

Determining whether the proposals are "meritorious," obviously requires the commission to consider the merits of the proposals. Yet, in granting TURN access, the commission states that it will not undertake to control TURN's messages. (*Id.;* J.S., app., p. 17.) But, if TURN makes misrepresentations or misleads the public by its inserts, the commission has no recourse but to police future inserts, or to suspend them. This is indeed censorship.

weighed TURN's message against PGandE's, it unlawfully evaluated the merits of the speech of the parties.[17] On the other hand, if it simply surmised that TURN's messages are more beneficial then it incorrectly relieved itself of the burden of demonstrating in the record why inserting TURN's messages is a more beneficial use of the envelope extra space.[18](See *Elrod v. Burns,* 427 U.S. 347, 362 (1976).)

This is a clear case where the government has placed itself in the role of selecting and licensing speakers to use PGandE's envelope based upon what they intend to say. TURN was chosen precisely because it represents a viewpoint directly opposite

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[17] By selecting the speaker for the billing envelope, the commission indirectly determines the content of the message to be communicated. Sanctioning this would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall,*357 U.S. 513, 526 (1958). Moreover, in *Regan v. Time, Inc.,* ____ U.S. ____, 82 L.Ed.2d 487 (1984) the Court stated that it is impermissible for a state to make determinations based on the newsworthiness or educational value of the speaker's message. (*Id.* at 494.) There, the Court recognized, as must be recognized here, that "[a] determination concerning the newsworthiness or educational value . . . cannot help but be based on the content . . . and the message it delivers . . . [O]ne . . . will be allowed and another disallowed solely because the government determines that the message being conveyed in . . . one is newsworthy or educational while the message imparted by the other is not." (Id.) Similarly, the commission can control the message communicated merely by its selection of speakers allowed to use the billing envelope. This indirect content regulation "cannot be tolerated under the First Amendment." *(Carey v. Brown,* 447 U.S. 455, 463 (1980).)

[18] The commission's own words indicate that it judged content:

> Based on the evidence and arguments presented in this proceeding, *we believe that,* in *general, TURN's proposals are meritorious.* Under each proposal, residential ratepayers . . . would be given an opportunity to be informed of and to support advocacy efforts on their behalf through use of the extra space in the billing envelope. *We believe that this would be an appropriate and efficient use of the extra space.* (Dec. No. 83-12-047; J.S., app., p. 16.) (emphasis added).

PGandE's. Selecting TURN or any other person as the speaker to use the envelope involves improper content censorship. In *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972), Chicago selectively allowed certain groups to picket near schools, but denied that right to all other groups. Chicago argued that its ordinance was "not improper content censorship." (*Id.* at 99.) But, Justice Marshall, writing for the Court, found otherwise. "Freedom of expression . . . would rest," said Justice Marshall, "on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorized basis." (*Id.* at 101.) "Once a forum is opened to . . . speaking by some groups, government may not prohibit others from . . . speaking on the basis of what they intend to say." (*Id.* at 96.) Although this important principle was ignored by the commission's majority, it was strongly emphasized by Commissioner Bagley in his dissent:

> As to rights, TURN certainly cannot lay claim to any greater rights than any other ratepayer or consumer group that might request access to the billing envelope. *Thus, I am concerned that this Commission not place itself in a predicament where it will be called upon to resolve disputes as to whom or when or how often a multitude of competing groups or ratepayers should be granted access to the billing envelope.* (Dec. No. 84-05-039; (Bagley, dissenting) J.S., app., p. 56.) (emphasis added).

To carry out the commission's edict, government will be required not only to pick and choose from the multitude of competing groups, but also to resolve the numerous disputes that will inevitably arise because of what the various groups, both political and nonpolitical, will wish to say. Thus, government will license speakers to use the envelope based solely upon what they intend to say.[19]

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[19] In granting TURN access to appellant's billing envelope, the commission takes on the awesome and completely unmanageable task of picking and choosing from the multitude of competing interests, including political groups, who may wish to communicate through PGandE's envelope. For example, on October 17, 1984, in *Committee of More*

Recently, a New York Supreme Court (County of Albany) held unconstitutional a New York Public Service Commission policy granting consumers the right to publish their messages in utility billing envelopes. Finding the New York policy to be dangerous, the New York court said:

> Under the Commission's policy, the Commission has the right to decide what groups (CUBs) will have access to the Utilities' billing envelopes. . . . Herein lies the danger; not whether the Commission in its good intention desires to give equal opportunity to the consumers in expressing their views, but allowing itself to enter the arena of public opinion. Under the Commission's statement, it has authority to determine what will be objectionable and to some degree what will be included in petitioners' envelopes.
>
> In the opinion of this Court an ominous threat presents itself to the First Amendment in allowing a governmental agency the right to license others in the use of another's property especially where the use of such property pertains to ideology which may oppose the views of such owner. (*Consolidated Edison Co. v. Public Service Comm'n.*, ____ Misc. 2d ____, ____ N.Y.S. 2d ____, Albany County Spec. Term Calendar Nos. 14, 15, 16, 17, 31, 39, 44, slip op., at pp. 8-9 (April 10, 1985).)

Than 1 Million California Taxpayers To Save Prop. 13 v. Pacific Gas and Electric Co., (Dec. No. 84-10-062; J.S., app., pp. 157-164), the commissioners denied the request of a political group to insert material into utility billing envelopes. The denial was because: (1) the group did not properly allege it has participated or intends to participate in commission proceedings; and (2) the political group seeking use of the "extra" space did not allege that the group's use would improve consumer participation in commission proceedings. (*Id.* at 161.) Thus, it is indeed clear that speakers will be selected by the commission based upon "what they intend to say." (*Police Department of Chicago v. Mosley*, 408 U.S. at 96.)

In a concurring opinion, Commissioner Calvo stated that he would reject the request of the political group because he is not convinced that any group is entitled to "invade a public utility's billing envelope to convey their messages" and because he believes "other media and forums exist that are better suited to carry those messages. . . ." (*Id.*, (Calvo, concurring); J.S., app., p. 163). Commissioner Bagley concluded that " . . . I continue to believe that any and all such assignment of envelope space by this Commission to other entities is a deprivation of the constitutional rights of the subject utility companies." (*Id.* (Bagley, concurring); J.S., app., p. 164)

In the instant case the commission ignored its own similiar warning expressed in a prior decision where it said restricting PGandE's use of the extra space and substituting "other speech, composed by the Commission, interested public participants s.ch as TURN or other parties" (Dec. No. 93887; J.S., app., p. 70) could "simply be a substitute of one form of speech for another, a preference for governmentally sponsored or *governmentally allowed speech*. Such a preference *could be more dangerous than the evil* which TURN seeks to correct." (*Id.*) (emphasis added). By selecting speakers for PGandE's billing envelope, the commission now has done exactly what it previously warned "could be more dangerous than the evil" (*Id.*) it wanted to correct.

II

THE STATE'S JUSTIFICATION FOR RESTRICTING APPELLANT'S FIRST AMENDMENT RIGHTS DOES NOT MEET THE TEST FOR REGULATING SPEECH.

A. The Commission's Order Is Impermissible Under the Standards for Regulating First Amendment Activity.

1. The Necessity of Meeting the Compelling Interest Standard Applies Even Though Appellant Is a Regulated Monopoly.

This Court has consistently held that when First Amendment rights are abridged the normal presumptions of constitutionality do not apply, and the state bears the heavy burden of showing the existence of a compelling governmental interest sufficient to justify any abridgment. (See *Thomas v. Collins*, 323 U.S. 516 (1945); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Schneider v. State* (*Town of Irvington*), 308 U.S. 147 (1939).) In *Citizens Against Rent Control v. Berkeley*, 454 U.S. at 294, the Court

specifically stated "that regulation of First Amendment rights is always subject to exacting judicial review." Thus, the commission bears the heavy burden of demonstrating the existence of a compelling governmental interest sufficient to justify its order granting TURN access to appellant's envelope. (See *Elrod v. Burns*, 427 U.S. at 362.) This burden was not met in the proceedings below.

Rather than meeting its heavy burden of producing evidence to demonstrate a compelling interest for its regulation, the commission merely concluded that "[i]n the present matter a compelling state interest in regulating the use of the extra space has been demonstrated and the TURN proposal as we adopt it does regulates that use in a constitutionally permissible way." (Dec. No. 83-12-047; J.S., app., p. 22) In fact, the commission does not, and indeed cannot, cite to any evidence in the record to support its conclusion. Instead, it relies heavily upon appellant's status as a regulated monopoly as a basis for ordering it to publish TURN's message. (*Id.*; J.S., app., pp. 26-27.) Such reliance incorrectly assumes that "monopoly" status restricts the application of the First Amendment and gives the commission unlimited authority to regulate appellant. As explained by the commission, "even assuming that the extra space is PG&E's property, it must not be forgotten that PG&E is a monopoly utility closely regulated by this Commission pursuant to the authority derived from the State's constitution." (Dec. No. 84-05-039; J.S., app., p. 52.) "But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interest of a government in overseeing the use of its property." (*Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. at 540.) *Consolidated Edison* expressly rejected, as must be done here, the New York Public Service Commission's reliance upon a utility's status as a heavily regulated monopoly as a basis for denying First Amendment freedoms.[20]

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[20] *Consolidated Edison* rejected the commission's premise:

> *Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights.* [citation omitted] We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. [citation omitted] Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. [citation omitted] (447 U.S. at 534, n. 1.) (emphasis added).

In *First National Bank of Boston v. Bellotti, supra,* 435 U.S. 765, the Court explained that government's ability to restrict speech "by corporations turns on whether it [the regulation] can survive the exacting scrutiny necessitated by a state-imposed restricton of freedom of speech." (*Id.* at 786.) Moreover, "the State may prevail only upon showing a subordinating interest which is compelling" (*Bates v. Little Rock*, 361 U.S. 516, 524 (1960)), and "the burden is on the government to show the existence of such an interest." (*Elrod v. Burns*, 427 U.S. at 362.) Not only must the State demonstrate a compelling interest, but it must also employ means "closely drawn to avoid unnecessary abridgment. . . ."[21] (*Buckley v. Valeo*, 424 U.S. at 25; see also, discussion *infra pp.* 36-40.) The commission's order cannot survive this test.

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[21] In *Citizens Against Rent Control v. Berkeley*, 454 U.S. at 302 (Blackmun, J. and O'Connor, J., concurring), it was noted that the City of Berkeley's limitation on campaign contributions could not survive a constitutional challenge unless it withstood "exacting scrutiny." Justices Blackmun and O'Connor (concurring) correctly stated the standard of review that the Berkeley ordinance had to survive: "To meet this rigorous standard of review, Berkeley must demonstrate that its ordinance advances a sufficiently important governmental interest and employs means closely drawn to avoid unnecessary abridgment of First Amendment freedoms." [citation omitted] (*Id.* at 302, (Blackmun, J. and O'Connor, J. concurring).) As Justice Marshall, also concurring in the *Berkeley* case pointed out, the evidence of the significant governmental interest narrowly drawn must be in the record. (*Id.* (Marshall, J. concurring).) Of course, in the instant case, as in *Berkeley*, there is "no such evidentiary support in this record." (*Id.*)

2. A Redefinition of the Ownership of the Extra Space Cannot Alleviate the State's Burden of Showing That the Regulation Is Permissible.

(a) Regardless of Ownership of the Extra Space, the State Must Show That Its Regulation Meets Constitutional Standards.

Below, the commission held that appellant's constitutional challenge to its order was resolved by its holding that the envelope extra space is ratepayer property. (Dec. No. 83-12-047; J.S., app., pp. 3, 27.) The basic flaw of this holding is that it characterizes the extra space as space or "property" that exists in a vacuum separate and apart from the billing envelope itself, which the commission acknowledges belongs to PGandE. (Dec. No. 83-12-047; J.S., app., pp. 2-3.) The reality, however, is that the extra space exists solely because of the nature of the billing envelope and how postage rates are calculated. Extra envelope space is an inseparable part of the envelope. It cannot be utilized by TURN or anybody else without a physical invasion of appellant's envelope.

The outcome of this case does not depend upon the ownership of the extra space. Because, regardless of how the ownership of that extra space is defined, the commission's regulation of what goes into appellant's billing envelope must still meet constitutional standards.[22] *Consolidated Edison,* in holding that the regulation of a utility's billing envelope must be governed by the state's ability to "demonstrate that its regulation is constitutionally permissible", (447 U.S. at 535) rejected the underlying premise of the commission's ownership rationale. Under the

[22] According to the commission's analysis, constitutional standards may be evaded by merely redefining the property interest in the envelope extra space:

> In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. (Dec. No. 84-05-039; J.S., app., p. 52.) (emphasis in original).

commission's rationale a state can overrule *Consolidated Edison* by a simple redefinition of the utility's rights in its property. It matters not to the commission whether the protected rights involve the utility's extra space on the sides on its vehicles, its office extra space or its billing envelope extra space. Because, a state can regulate, in the commission's view, those rights by merely declaring the property to be that of ratepayers rather than shareholders. If this logic is correct, then *Consolidated Edison's* holding is, indeed, illusory. First Amendment rights of utilities would rest upon mere definitions of their interest in property rather than upon established constitutional principles. This "strikes at the heart of the freedom to speak." (*Id.*)

Finally, under the less rigorous standards set forth in *Central Hudson,* a state may regulate utility speech only if it asserts a substantial interest and "the regulatory technique [is] in proportion to that interest." (*Id.* at 564.) *Central Hudson* makes clear the standards for regulating utility speech:

> First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive. (*Id.*)

Therefore, when measuring state regulation against required constitutional standards,[23] ownership of the extra space is irrelevant.

[23] The *Central Hudson* standard is as follows:

> In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. (*Central Hudson*

A state cannot evade constitutional standards by redefining the activity (extra space) regulated.

(b) The Holding That Customers Buy Extra Envelope Space When They Pay Their Utility Bills Directly Conflicts With Decisions of This Court.

The commission did not cite, nor could it, a single case for its conclusion that customers purchase extra envelope space when they pay their utility bills. Instead it surmised that "the extra space is a byproduct of the billing process which is paid for by ratepayers" (Dec. No. 84-05-039; J.S., app., p. 52); and therefore "the extra space is not 'property held by [PG&E] in ownership' " (Dec. No. 83-12-047; J.S., app., p. 26), but rather property that belongs to ratepayers.(*Id.*) If payments for utility service purchase an interest in the extra envelope space, it logically follows that such payments also buy a similar interest in extra utility vehicle space, office space, computer capacity and in other facilities used to render customer service. The commission's holding is so contrary to law that it merits little, if any, serious discussion.[24] It conflicts directly with *Board of Public Utility Comm'rs. v. New York Telephone Co.*, 271 U.S. at 32 where this Court specifically found that:

Gas & Electric Corp. v. Public Utilities Comm'n.,447 U.S. at 566.)

[24] In a recent law review article, the author opined that the commission's ownership analysis is simply incorrect:

> The fact ratepayers pay for envelope and postage costs is an insufficient reason to give them rights to extra envelope space. Consumers may not take property rights to a company's service and billing mechanism merely because they pay for the mechanism. . . . Utility property rights are those of the investors and exist apart from regulation. Without regulation, envelopes used by the utility would be utility property. Because regulation does not transfer property rights, *a* regulated utility's billing envelopes still belong to the utility. *Access To Public Utility Communications: Limits Under The Fifth And First Amendments,* (21 *San Diego Law Review* 391, 397-399 (1984).) (emphasis added).

> Customer pay for service, not for the property used to render it. *Their payments are not contributions to depreciation or to other operating expenses,* or to the capital of the company. By paying bills for service *they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.* (emphasis added).

"Customers are entitled to demand service and the company must comply." (*Id.* at 31.) But, the "relationship between the company and its customers is not that of partners, agents and principal, or trustee beneficiary." (*Id.*) Utility property "although devoted to the public service and impressed with a public interest is still private property."[25] (*United Railways and Electric Company of Baltimore v. West,* 280 U.S. 234, 249 (1930), was overruled on other grounds in *Federal Power Comm'n. v. Hope Natural Gas Co.,* 320 U.S. 591 (1944).) In *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'n.,* 262 U.S. 276 (1923), the Court explained what the commission below ignored:

> It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with general power of management incident to ownership. (*Id.* at 289.)

The First Amendment would indeed rest upon "a soft foundation" (*Police Department of Chicago v. Mosley,* 408 U.S. at 99)

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[25] This is an elementary principle of utility regulation which the commission below rejects. (See *Philadelphia Suburban Water Company v. Pennsylvania Public Utility Comm'n.,* 487 A.2d 1244 (1981); *Village of Wellsville v. Maltbie,* 15 N.Y.S.2d 580, 585 (1930).) In *Duke Power Company,* (Opin. No. 641, 48 FPC 1384, (Dec. 18, 1972)), the Federal Power Commission (now the Federal Energy Regulatory Commission) observed: "Property paid for out of monies received for service belongs to the Company just as that purchased out of proceeds of its bonds and stocks." (*Id.* at 1395.)

if government could simply redefine interest in utility property to evade constitutional standards. Today, a majority of the commission says appellant has no First Amendment rights in the extra envelope space because customers purchase that space when they pay for their utility service; tomorrow, a different commission majority is free to hold otherwise. First Amendment rights cannot rest upon such a fragile foundation.

B. The Commission's Identified Interests Are Neither Compelling Nor Substantial.

Although there is no evidence in the record to support its conclusion, the commission in its Motion to Dismiss, nevertheless, sets forth a laundry list of alleged interests for regulating the contents of PGandE's envelope:[26]

> It promotes full and effective consumer participation in CPUC proceedings. App. A27, A35, A36. It enhances the accuracy of the fact-finding process by "tend[ing] to enhance the record in [such] proceedings." App. A36. It provides information about consumer organizations. . . . App. A20-A21, A27, A36. It advances the ratepayers' state and federal constitutional rights to receive ideas and information, based on the assumption "that the ratepayers will benefit more from exposure to a variety of views than they will from only [those] of PG&E." App. A22. It provides added protection for the particular interests of residential ratepayers and other specific ratepayer groups. . . . App. A20. It limits the ratepayers' compelled subsidy of utility speech in violation of PURPA. App. A3-A4. [citations omitted] It halts PG&E's misappropriation of an asset which belongs to the ratepayers

[26] Since there is no evidence in the record concerning most of these alleged interests, the commission's order cannot be sustained. "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." (*SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943); see also, *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972).)

> and the utility's consequent unjust enrichment. App. A4. And it promotes fair and efficient rates, the overall objective of the regulatory scheme. [citations omitted] (Commission's M.D., pp. 17-18.)

These eight (8) identified, and largely redundant alleged interests, are neither compelling nor substantial. They fall far short of the test required by *Consolidated Edison* and *Central Hudson* for regulating utility speech. Moreover, the Court already, in *Buckley v. Valeo, supra*, 424 U.S. 1, has rejected almost all of these alleged governmental interests as insufficient to regulate First Amendment rights. For example, in *Buckley*, the government sought to promote a more balanced market place of ideas by limiting the amount that could be expended in certain political campaigns, therefore, curtailing the speech of those who had the means to communicate. The stated governmental interests in *Buckley* were almost identical to most of the commission's asserted interests in enhancing TURN's voice in order to achieve fuller consumer participation and understanding of commission proceedings.[27] Yet, the *Buckley* Court found such interests could not support infringement of speech because "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." (*Id.* at 48-49.) Here, more

[27] In *Vermont Public Interest Research Group* v. *Central Vermont Public Corp.* 39 PUR 4th 59 (1981) the State of Vermont rejected similar interests as being insufficient to grant a right of access:

> Underlying all of petitioners' arguments is the assumption that government has an obligation to ensure that a wide variety of views reach the public and that all ideas should be guaranteed by the government of (sic) equal access to the "marketplace of ideas." While the First and Fourteenth Amendments ban government from interfering in any way with free speech or press, government is not required to ensure that all ideas have equal standing. *The First Amendment, rather than justifying a government imposed obligation to publish, protects individuals and corporations from being compelled by the government to publish that which they do not wish to publish.* (*Vermont Public Interest Research Group* v. *Central Vermont Public Service Board, supra*, 39 PUR 4th, at pp. 72-73.) (emphasis added.)

so than in *Buckley*, the state's alleged interests in improving the flow of ideas are perniciously pursued not only by commandeering appellant's billing envelope, but also by appropriating some of appellant's resources to enhance TURN's voice.[28]

The commission's confusion about the First Amendment's application is illustrated by its argument that the "state's interest in accommodating the First Amendment and state constitutional rights of its citizens is 'compelling.' " (Commission's M.D., p. 20, n. 22; see also, p. 19, n. 20.) *Widmar v. Vincent*, 454 U.S. 263 (1981) is cited for this proposition. But *Widmar* does not support the argument. The issue in *Widmar* was once the University of Missouri had "opened its facilities for use by student groups ... whether it [could] now exclude [other] groups because of the [religious] content of their speeches." (454 U.S. at 273.) *Widmar* specifically declined to adopt the position argued by the commission: "it is ... unnecessary for us to decide whether ... a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment." (*Id.* at 275-276.) Moreover, the Court in *Widmar* refused to recognize the State's interest there in achieving greater separation of church and State "as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." (*Id.* at 276.)

Finally, the remainder of the commission's laundry list of alleged interests amounts to nothing more than speculation of harm to consumers if TURN is not granted access to PGandE's envelope. "Mere speculation of harm does not constitute a compelling state interest." (*Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. at 543.) And, even if the stated interests constitute (which they do not in this case) compelling or substantial state interests, the method chosen to accomplish them is

[28] For example, the commission mandated:
In addition to ordering PGandE to make space available, *we are also ordering it to do one thing further, and that is to use its equipment* to put the inserts of others into the billing envelope extra space. (Dec. No. 83-12-047; J.S., app., p. 23.) (emphasis added).

neither narrowly tailored to serve the stated purposes (*Consolidated Edison, supra*, 447 U.S. 530) nor does it "directly advance the state interest[s] involved." (*Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. at 564.) Even if legitimate, which they are not, all of the identified governmental interests could be easily achieved by means which do not in any way infringe PGandE's First Amendment rights.

C. The Commission's Order Is Not Narrowly Drawn; It Ignores Readily Available Alternatives That Do Not Restrict Speech at All.

Consolidated Edison held that restrictions on utility speech "may be sustained only if government can show that the regulation is a precisely drawn means of serving a compelling state interest." (447 U.S. at 540.) Ordering PGandE to publish TURN's messages is not "precisely drawn." Rather, it broadly stifles fundamental First Amendment rights. In *Shelton v. Tucker*, 364 U.S. 479 (1960) the Court emphasized that even if "the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*Id.* at 488.)

Even when non-First Amendment rights are restricted, this Court adheres to the doctrine that if the government has available a variety of equally effective means of achieving a given end, it must choose the method which least interferes with individual liberties.[29] The commission, however, has completely ignored this doctrine and chosen a most drastic means for achieving its alleged interests.[30] But as emphasized in *Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973):

[29] E.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 507-508 (1964); *Dean Milk Company v. City of Madison*, 340 U.S. 349, 354 (1951); see also, Comment, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1968).

[30] In *Vermont Public Interest Research Group, Inc. v. Central Vermont Public Corp.*, 39 PUR 4th 59 (1981), the Vermont Public Service

> For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. [citation omitted] '*Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.*' [citation omitted] If the state has opened to it a less drastic way of satisfying its legitimate interest, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. [citation omitted.] (emphasis added).

The commission's laundry list of alleged state interests could be equally or perhaps better served by a multitude of other means which do not infringe at all upon appellant's First Amendment rights. For instance, awarding attorney or intervenor fees to successful intervenors would provide a direct incentive and reward for participation in commission cases.[31] Fee awards also allow the

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Board was requested to provide an identical right of access to the utility billing envelope. Rejecting the request, Vermont held that:

> Not only would a right of access policy in respect of the utility billing process inevitably curtail the very freedoms that petitioners assert would be enhanced, the administration of a right of access policy would be simply impractical. Parceling out the right to use the utility bill among every would-be pamphleteer and politician would be, *as a practical matter, impossible, subjecting the board to charges of favoritism and exposing it to endless litigation.* (*Id.* at 72.) (emphasis added).

[31] The Public Utility Regulatory Act (PURPA) provides a basis for adopting rules for awarding reasonable fees and costs to intervenors making contributions in specified areas in proceedings involving electric utilities. (16 U.S.C. § 2632 (1978).) The commission has adopted rules to implement this legislation. (See Rule 76.01 et seq. of the Commission's Rules of Practice and Procedure reprinted in the Appendix to the Jurisdictional Statement.) (J.S., app., pp. 165-182.) Also, on July 5, 1984, California's Governor signed into law Intervenor's Fees and Expenses legislation which authorizes the commission to award reasonable advocate's fees, expert witness fees, and other cost of participation or intervention in any hearing or proceeding before the commission relating to utility rates. (See 1984 Cal. Legis. Serv. Ch. 297 (West); J.S., app., p.151.) Since 1982, the commission has awarded TURN $164,321.72.

commission to ensure that the dollars received are related to the commission proceeding involved. Moreover, such awards allow an unlimited number of groups, not just TURN, to be eligible to receive fees for participating in commission proceedings based upon judicially accepted standards. This would foster wider participation in commission proceedings and would not require that government pick and choose or license the speakers.

If, as claimed by the commission, an additional interest sought to be served by the commission's order is to prevent PGandE from receiving a "free ride" in the billing envelope and to limit "compelled subsidy of utility speech" (commission's M.D., p. 18), these interests can be easily served by means which do not restrict speech. For example, PGandE conceded in the proceeding below that "if forced subsidization is indeed the evil sought to be remedied, then assessing a reasonable value for the use of that [extra space] would remedy the problem. . . . " (*Reply Brief In Support of Petition for The Writ of Review of Pacific Gas and Electric Company*, S.F. No. 24734, (8/3/84) at 15, n. 8.) PGandE acknowledged below that "the commission [could] make reasonable allocations of cost for the extra space," (*Id.* at 14) if that is the interest to be served, because "[s]uch allocations occur routinely in utility ratemaking." (*Id.* at 14.) Allowing TURN and other organizations to use appellant's envelope restricts First Amendment rights. It is not a narrowly tailored means of serving a compelling state interest. It does nothing to limit forced subsidization of speech in the billing envelope. Instead it compels the subsidization of TURN's speech.

Commissioner Calvo (dissenting) correctly observed that there are numerous alternatives which do not restrict speech that are available for the commission to achieve its alleged interests other than publishing TURN's message in PGandE's envelope:

> TURN has other opportunities to reach its natural audience. It may solicit support through its own mailings. Additionally, our rules regarding intervenor fees are frequently

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At the present, another consumer oriented group is seeking $856,265.00 in intervenor fees.

> used to reward TURN's good efforts and, in fact, in another action today we award TURN $13,102 in attorney's fees for its contribution in a Commission rate case proceeding. I question, therefore, if TURN or any other party *needs* access to the billing envelope in order to be an effective participant in our proceedings. (Dec. No. 84-05-039, (Calvo, V., dissenting,) J.S., app., p. 56.) (emphasis in original).

Finally, it must be emphasized *again* and *again* that even if the commission's purpose is legitimate and represents a compelling or substantial governmental purpose, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (*Shelton v. Tucker,* 364 U.S. at 488.) The decision below fails this test.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California, upholding the decision of the commission, should be reversed; and the commission's decision should be vacated.

Respectfully submitted,

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May 30, 1985

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No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,
v.
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION,
CONSUMERS UNION,
CONSUMER FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal From The Supreme Court Of California

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STATEMENT OF THE CASE

The Appellees filing this brief adopt the statement of the case set forth in the brief on the merits concurrently being filed by Appellee California Public Utilities Commission (hereafter "CPUC").

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises out of an effort by the California Public Utilities Commission equitably to apportion the "extra space" in a utility billing envelope between the utility and its customers.[1] The decision below permits Appellee Toward Utility Rate Normalization (TURN)—which the CPUC found "represent[s] the interests of a substantial segment of the PG&E residential ratepayer population" (CPUC App. 19)—to use the extra space in the Pacific Gas & Electric Co. (PG&E) billing envelopes four times a year for the next two years. During these months, PG&E may use any extra space not used by TURN (*id.* at 22) and it also may include additional materials in the envelope if it pays the extra postage. Every TURN insert "shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or [the] Commission." *Id.* at 39. Funds received by TURN as a result of its billing inserts may be used only for "purposes related to ratepayer representation in Commission proceedings involving PG&E." *Id.*

As PG&E has apparently conceded, the CPUC's order will not adversely affect its right to communicate with its customers. Nothing in the order prevents PG&E from sending its monthly newsletter, *Progress* (or anything else), to its ratepayers along with their bills, precisely as has been done in the past. Moreover, although it is theoretically possible that during a particular month including both a TURN insert and *Progress* in the envelope might

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[1] The CPUC has defined the "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." Appendix to the CPUC's Motion to Dismiss (hereafter "CPUC App.") at 3.

force PG&E to pay some additional postage, PG&E did not demonstrate below that this will ever occur. Indeed, PG&E has specifically disavowed any claim that it might have to pay additional postage as a result of the CPUC's order. In all events, because *Progress* now gets a "free ride" in the utility billing envelope—which is paid for by the ratepayers—requiring PG&E on occasion to pay for mailing its newsletter only places it in the same position as any other user of the postal system, which similarly must pay its own mailing expenses.

Nor does putting TURN's leaflets in the same billing envelope as *Progress* unconstitutionally "dilute" or "chill" PG&E's speech. Speech is not "diluted" or "chilled" merely because it may become the focal point for other, equally-protected expression. The First Amendment does not authorize PG&E to silence TURN in order to strengthen its own speech.

PG&E argues that the decision below violates the "well-established" rule that "a state cannot compel a person to carry a message against his or her will." PG&E Br. 9. Yet numerous decisions of this Court and statutes of unquestioned validity confirm that no inviolable principle of law prohibits government from requiring individuals—and, *a fortiori*, regulated monopolies such as PG&E—to serve as conduits for either government-prepared or third-party messages. Indeed, the same absolutist theory advanced by PG&E here was rejected by the Court in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

PG&E's "well-established" rule is based on its contention that the "negative" rights protected by the First Amendment (*i.e.*, the rights not to speak and not to associate with the speech of others) enjoy the same protection against infringement as do their "affirmative" counterparts. This contention ignores the different goals served by the two classes of rights. While the "affirmative" First Amendment rights to speak and associate freely exist in large part to protect the "marketplace of ideas," "negative" First Amendment rights do not serve this purpose, but instead further two separate and distinct interests: editorial autonomy and "individual freedom of mind." Neither of these interests is adversely affected by the decision below.

The first of these interests—editorial autonomy—was identified by the Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), upon which PG&E heavily relies. But the constitutional flaws which led the Court to invalidate the right-of-reply statute in that case are not found in the decision below. The CPUC's order does not compel PG&E to subsidize the speech of others, nor does it impair PG&E's own ability to communicate. Moreover, TURN's right of access is not triggered by the fact or content of PG&E's own communications; it would remain even if PG&E stopped sending *Progress* in the billing envelope altogether. Finally, the CPUC's order does not interfere with PG&E's editorial judgment, since TURN has not been permitted to invade the pages of PG&E's newsletter.

Moreover, the constitutional principles which apply to a billing envelope and those applicable to a newspaper are quite dissimilar. Unlike newspapers, utility billing envelopes exist primarily to facilitate a commercial transaction; as a result, they historically have been both heavily regulated and used by the States for the transmission of state-mandated messages. Furthermore, billing envelopes are simply passive vehicles for the messages inside them, and have no identity of their own as a medium of communication. For these reasons, a decision as to what should go into a billing envelope is not analogous to the editorial judgment protected by *Tornillo*.

PG&E's reliance on *Tornillo* also fails to recognize that the extra space to which TURN seeks access has been conclusively defined to be ratepayer property under California law. Since the editorial autonomy which *Tornillo* protects does not give an editor control over someone else's property, that decision provides no support for PG&E's efforts to exclude all other parties from the billing envelope extra space.

PG&E's reliance on *Wooley v. Maynard*, 430 U.S. 705 (1977), is no more apt than its invocation of *Tornillo*. *Wooley*, like *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), acknowledges an individual's "right to refrain from speaking" where government attempts to coerce speech in order to advance political or ideological orthodoxy. But PG&E's assumption that *it* may invoke this right is unwarranted. Like the

privilege against self-incrimination, "the right to remain silent" exists to protect an individual's freedom of conscience and hence cannot be claimed by corporations such as PG&E. PG&E's claim of corporate autonomy is also undermined by its voluntary participation in an industry which historically has been pervasively regulated, particularly with respect to the very aspect of its business that is the subject of the regulation at issue here.

In all events, this case involves no violation of the "right to refrain from speaking." The nexus in this case between TURN's speech and PG&E is distant, at best. The billing envelope is not property used by an individual on a daily basis as part of his personal life, but is, instead, simply a medium for an impersonal commercial transaction. Moreover, there is no danger here that TURN's views will be misidentified as belonging to PG&E, because the order explicitly requires TURN's materials to identify their source. Nor is PG&E being required to adopt any particular ideological or political point of view. Finally, because the extra space belongs to the ratepayers, not to PG&E, the utility has no right to prevent the State from enforcing third-party access to that property.

PG&E also contends that any impairment of its "negative" First Amendment rights must be justified by a "compelling state interest." But this Court's cases do not adopt any such rigid approach; instead, the Court has resolved "negative" First Amendment claims by adopting a balancing test in which the level of scrutiny applied to the asserted governmental interest varies in proportion to the degree of intrusion into the individual's autonomy. In this case, the minimal infringement, if any, on PG&E's "negative" First Amendment rights is more than outweighed by the important countervailing interests in encouraging ratepayer participation in CPUC proceedings and expanding the range of information available to ratepayers on energy-related issues.

Finally, PG&E asserts that the CPUC's order is based on an impermissible evaluation of the content of its speech and that the future implementation of the decision will necessarily engender other content-based determinations. The decision below, however, did not rest on a subjective evaluation of either PG&E's

speech or that of TURN. Instead, it was premised on a content-neutral and constitutionally-permissible preference for having two speakers communicating through the billing envelope, rather than one. Given the CPUC's unequivocal intent not to evaluate the content of anyone's speech, the Commission in the future undoubtedly will be able to regulate billing envelope access in a constitutional manner, by either invoking content-neutral criteria for deciding between applicants, adopting a "checkoff" mechanism that would permit all qualified groups to obtain billing envelope access or forming a new, democratically-elected organization to represent ratepayers.

ARGUMENT
I

THE DECISION BELOW DOES NOT INFRINGE PG&E'S RIGHT TO COMMUNICATE WITH ITS CUSTOMERS THROUGH THE BILLING ENVELOPE.

In its Jurisdictional Statement, PG&E contended—as an independent and sufficient ground for reversal—that the CPUC's order would have the effect of "either denying or severely restricting [its] right to disseminate its own information to its customers." J.S. 13. PG&E has now apparently abandoned this argument. Its brief on the merits focuses primarily on the alleged threat posed by the CPUC's order to Appellant's right *not* to speak or to associate with TURN's speech. But because Appellant's brief continues to make unsupportable claims concerning the effect of the decision below on its ability to express its views, we shall address this issue briefly.

A. The Decision Below Does Not Restrict PG&E's Right To Put Its Newsletter In The Billing Envelope.

PG&E and several of its amici claim that the CPUC's order permits TURN "to preempt the billing envelope," by making Appellant's ability to communicate with its customers "hinge entirely upon TURN and its decision as to the length of its message, or the weight of paper that it uses." PG&E Br. 12. This characterization of the decision below has no basis in the facts of this case. Nothing in the CPUC's order bars PG&E from enclos-

ing its newsletter, or anything else,[2] in customer billing envelopes whenever it chooses to do so. During eight months of the year, PG&E may insert *Progress* in the envelope precisely as it has previously done; in those months, the entire cost of the mailing will continue to be borne by the ratepayers.[3] In the remaining four months, Appellant will be similarly free to send *Progress* to its customers, along with TURN's insert, provided only that it pays the additional postage, if any, which the inclusion of *Progress* might require. The length of TURN's message and the weight of its paper thus have no bearing on PG&E's ability to communicate, which is not abridged by the decision below.[4]

It is theoretically possible that the CPUC's order might require PG&E's shareholders to pay the postage for *Progress* if, during a "TURN month," the TURN inserts and *Progress* consume more than the available extra space. But this possibility furnishes no basis for invalidating that decision. Although the amount of billing envelope extra space that PG&E may use during the four "TURN months" without paying additional postage may depend on the length of TURN's message and the weight of TURN's

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[2] The CPUC has expressly disclaimed any attempt to control PG&E's use of the extra space, as far as the content of its communications is concerned. CPUC App. 38.

[3] The CPUC's present practice is to require Appellant's shareholders to bear the cost of preparing and printing *Progress* (PG&E Br. 4), but to permit the utility to recover all other costs associated with mailing the newsletter (including postage) from the ratepayers. CPUC App. 6-7. PG&E's newsletter thus gets a "free ride" in the billing envelope at the ratepayers' expense.

[4] One amicus suggests that PG&E's speech might be limited if TURN's materials use up the physical capacity of the envelope. National Fuel Gas Distribution Corp. Br. 10 n.10. Since the extra space, by definition, is limited to printed matter which will not cause the billing envelope to weigh more than an ounce (*see* note 1, *supra*), this argument necessarily assumes that PG&E's billing envelopes can hold no more than that amount of material. This is most unlikely to be true, and there is certainly no evidence in the record to support this contention. But even if it were true, PG&E could simply solve the problem by using a larger envelope.

paper, Appellant presented no evidence in the proceeding below on these subjects.[5] Nor did PG&E present evidence concerning the amount of extra space in the average billing envelope or the average weight of *Progress*. Thus, PG&E has failed to show that it "is immediately in danger of sustaining some direct injury" to its right to communicate, and any claim based on the possibility of increased expense to PG&E is premature at best. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Indeed, PG&E has now waived any claim that the CPUC's order is invalid because it might cause Appellant to incur additional expense.[6]

Moreover, any such claim would be meritless. At most, the decision below occasionally may deprive *Progress* of the "free ride" it has previously enjoyed, by virtue of PG&E's unique status as a regulated monopoly, and force PG&E's shareholders to bear the same expense for mailing the newsletter that all other non-monopoly users of the postal service incur in mailing their messages. But there is no constitutional bar against requiring Appellant "to pay postage in a manner identical to other Postal Service patrons . . . ." *United States Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114, 127 (1981). And even if PG&E were not simply losing this "free ride," the fact that its use of the

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[5] The evidence that does exist on this subject indicates that Appellant's ability to use the extra space without incurring additional expense is not in serious jeopardy. After reviewing the flyer sent out as a result of the CPUC's decision in the *UCAN* case (*see* J.S. App. 90-110), TURN's attorney testified at the hearing before the CPUC that TURN "could develop something that would be very light, much lighter than the *Progress* . . . ." Transcript of Proceedings ("Tr.") 304. The same attorney also testified that TURN could abide by a weight limitation of three-tenths of an ounce on its billing inserts. *Id.* at 393.

[6] PG&E stated in response to TURN's Motion to Dismiss that "[t]his appeal is not . . . about a 'threat of injury to Appellant' because PG&E may have 'to pay additional postage if it wishes to communicate with its customers.'" Appellant's Brief in Opposition to Motions to Dismiss (hereafter "PG&E Br. Opp.") at 1. Nor does PG&E's brief advert to the financial consequences of the decision below. Any claim that the CPUC's order is invalid because it might cause Appellant to incur additional expense has thus been waived.

billing envelope might become more expensive would not render the CPUC's decision constitutionally suspect. *See City Council v. Taxpayers for Vincent*, ___ U.S. ___, 80 L. Ed. 2d 772, 792 n.30 (1984).

It is quite plain that the Commission, in the exercise of its established rate-setting authority, could have required in the first instance that the costs attributable to mailing *Progress* be charged to PG&E's shareholders, rather than its ratepayers, for rate-making purposes. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 543 (1980) (no reason to assume that commission could not exclude cost of bill inserts from rate base); *id.* at 554-55 (Blackmun and Rehnquist, JJ., dissenting).[7] Such an order would be far more burdensome to PG&E than the order it complains of. Yet such an order would be no more than a typical example of state economic regulation which must be upheld if supported by a rational basis. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).[8] *A fortiori*, the decision below—which permits

[7] Indeed, this Court has already rejected a constitutional attack on a utility commission order that forced a utility's shareholders to bear the entire cost of advertising which the commission found was unnecessary to the provision of utility services. *Rochester Gas & Elec. Corp. v. Public Serv. Comm'n*, 51 N.Y.2d 823, 413 N.E.2d 359, 433 N.Y.S.2d 420 (1980), *appeal dismissed for want of a substantial federal question*, 450 U.S. 961 (1981). Congress, too, has required state utility commissions to consider adopting similar policies. *See* 16 U.S.C. § 2623(b)(5). And PG&E admits that the Commission has the authority to make any "reasonable allocation[] of cost for the extra space" because "[s]uch allocations occur routinely in utility ratemaking." PG&E Br. 39.

[8] It is true that under a hypothetical CPUC order requiring PG&E to pay the cost for mailing *Progress* every month, PG&E's postage expenses would not be affected by the fact of TURN's speech. But because PG&E constitutionally may be ordered to pay the postage costs for *Progress* twelve times a year, it cannot complain if the CPUC has issued an order which might increase PG&E's mailing costs one-third as often, and then only if TURN uses up all the extra space. "[G]overnments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied." *Zauderer v. Office of Disciplinary Counsel*, ___ U.S. ___, 53 U.S.L.W. 4587, 4594 n.14 (May 28, 1985). PG&E's "right" to charge the ratepayers for the mailing costs of *Progress*, instead of having to pay them itself like all other users of the postal system, is hardly "fundamental." *United States Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114 (1981).

PG&E to mail *Progress* to the ratepayers as often as it wishes and which has not been shown to result in *any* increased postage—does not violate PG&E's right to communicate.

B. PG&E's Right To Speak Is Not Violated Merely By Requiring Its Communications To Coexist In The Same Envelope With Those Of Third Parties.

The only concrete way in which PG&E contends that its ability to communicate will be infringed by the decision below is the claim—advanced in a footnote—that the utility's own messages may "suffer irreparably" from coexisting in the same envelope with those of third parties. PG&E Br. 14 n.11. Similar arguments are made by several amici.[9] These arguments are meritless, for several reasons.

In the first place, PG&E's claim that its messages will not be read once ratepayers "come to expect the [billing] envelope to contain third party solicitations and . . . act accordingly" (PG&E Br. 14 n.11) is sheer supposition. It is at least as likely that the end of PG&E's monopolization of the billing envelope will increase the probability that Appellant's bill inserts will be read, rather than discarded, since the extra space will then become a situs for lively public debate, rather than for the predictable communications of a single never-changing speaker. This contention also bespeaks a rather surprising lack of faith in PG&E's

[9] Bell Atlantic, for example, contends that inclusion of TURN's inserts in the billing envelope "will dilute the impact" of PG&E's messages (Bell Atlantic Br. 7), while the American Gas Association states categorically—as if it were a self-evident proposition—that when "PG&E's message is included with the message of another party, it is a fundamentally different message than when it is sent by itself." AGA Br. 5. And a third amicus (the Wisconsin State Telephone Association (WSTA)) claims that PG&E's communicative rights will be "chilled" because its speech might be attacked by third parties using the very same medium. WSTA Br. 12.

speech, since its unarticulated premise is that PG&E's messages only carry persuasive power when received in splendid isolation from the messages of those having other viewpoints.

Moreover, this Court has rejected the idea that the presence of several voices in the billing envelope will diminish the efficacy of any speaker's individual communications. When, in *Consolidated Edison*, the New York PSC sought to justify its ban on a utility's bill inserts on the theory that the utility's messages would take the place of inserts that the PSC felt were more desirable, the Court held in response that *both* the Con Ed inserts and the inserts favored by the PSC could coexist in the same envelope: "Unlike radio or television stations broadcasting on a single frequency, multiple bill inserts will not result in a 'cacophony of competing voices.' " *Consolidated Edison, supra*, 447 U.S. at 543. As long as each insert in a billing envelope may be considered by a recipient on its merits, there is no unconstitutional "dilution" of speech.[10]

The "chilling effect" theory that the First Amendment has been violated because PG&E's billing envelope messages may "be immediately attacked through the same medium" (WSTA Br. 12; *see* note 9, *supra*) suffers from similar defects. To begin with, its factual premise is faulty. Since utilities control the mechanics of the billing process, it is difficult to imagine a situation in which a third party would be able to obtain advance

[10] Even if it were true that PG&E's bill inserts might be less persuasive if accompanied by those of TURN, Appellant's constitutional rights would still not be violated. "The First Amendment right to associate and to advocate 'provides no guarantee that a speech will persuade or that advocacy will be effective.' " *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-65 (1979); *cf. Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (no right to demonstrate on jail grounds merely because the area is " 'particularly appropriate' " for petitioners' demonstration). If PG&E's communications fail to persuade when placed in the same envelope with those of TURN, PG&E's remedy is not to monopolize the billing envelope, but to speak more persuasively.

information regarding a utility's message in sufficient time to prepare an attack and include it in the very same envelope.[11]

The legal support for this argument is equally non-existent. While this Court has invalidated government prohibitions, sanctions, and regulations that have a "chilling effect" on speech (*see Laird v. Tatum*, 408 U.S. 1, 11-12 (1972) (collecting cases)), it has never done so where the only "chill" upon the speaker is that caused by the speech of others. Indeed, these "dilution" and "chilling effect" arguments stand the First Amendment on its head. The purpose of that provision is to foster "uninhibited, robust, and wide-open" debate (*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)), not to forestall it. Speech is not "diluted" or "chilled" merely because it may become the subject of controversy. *Cf. Cohen v. California*, 403 U.S. 15, 21-22 (1971).[12] And PG&E may not attempt to increase the efficacy of

[11] The same amicus which contends that PG&E's speech will be "chilled" by permitting TURN to use the billing envelope also (and contradictorily) suggests that TURN's access will unconstitutionally result in *more* PG&E speech, rather than less. WSTA Br. 12-13. This amicus contends that if TURN attacks PG&E, the utility may feel obligated to "respond or to suffer the clear implication that the accusations are true." *Id.* at 13.

This argument assumes that government-generated or facilitated speech that puts pressure on a private party to respond is unconstitutional. But no decision of this Court is cited for this proposition, and it is impossible to square with reality. Government officials routinely say or do things that create pressure for responses from private parties. (Indeed, there are certain situations—such as when the government issues an indictment—when the affected individual *must* respond.) If government officials do not violate a private party's constitutional rights by making unfounded and defamatory accusations (*Paul v. Davis*, 424 U.S. 693 (1976)), there is certainly no constitutional violation merely because a State has facilitated third-party speech that a utility might find unfavorable and to which it might wish to reply.

[12] The situation is different where either the fact or the content of speech triggers a right of reply. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974). In this case, however, TURN's access to the billing envelope is not dependent on whether PG&E uses the billing envelope or what it says therein. *See* p. 22, *infra*. Thus, the

its own speech by silencing that of TURN, for such a result is "wholly foreign" to the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).[13]

For all these reasons, the impact, if any, that the CPUC's order may have on PG&E's own communications provides no basis on which to overturn the decision below. PG&E's claimed right to exclude others from the billing envelope must therefore be based not on any inhibition of its affirmative right to express itself, but on the theory that such access allegedly violates its "negative" rights *not* to speak or to associate with the speech of others. *See* Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. Rev. 995, 995-96 (1982) (distinguishing between "affirmative" and "negative" First Amendment rights). That is the main argument presented by PG&E's brief, and we shall address it in the section that follows.

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only risk that PG&E accepts by communicating through the billing envelope is the chance—inherent in all speech—that its messages may be shown to be unpersuasive by the speech of others. That sort of "chill" is plainly not what the First Amendment was designed to prevent.

[13] The WSTA brief states that the Chairman of the Wisconsin Public Service Commission has written to utilities in that State, suggesting that they refrain from putting "reply enclosures" in the billing envelope, while simultaneously acknowledging the utilities' right to express their opinions freely. WSTA Br. App. 21a. Of course, the constitutional issues raised by this action are not before the Court. This case concerns a California access program under which the CPUC has explicitly disavowed any intent to regulate the content of either TURN's inserts or those of PG&E. CPUC App. 22, 38.

II

THE DECISION BELOW DOES NOT VIOLATE PG&E'S RIGHTS NOT TO SPEAK AND NOT TO ASSOCIATE WITH THE SPEECH OF OTHERS.

A. The Rights Not To Speak And Not To Associate With The Speech Of Others Are Neither Absolute Nor Identical To Their Affirmative Counterparts.

PG&E claims that compelling it "to publish or distribute materials . . . operates in much *the same* way as telling [it]what it can and cannot publish" (PG&E Br. 17 (emphasis added)) and that, as a result, a "compulsion to speak raises *the same* First Amendment issues as does a direct ban on speech." *Id.* at 13 (emphasis added). These contentions are in error. The "negative" First Amendment rights not to speak and not to associate with the speech of others are not coextensive with their affirmative counterparts. They are, instead, distinct and materially more limited rights, the extent and force of which cannot be mechanically measured by comparison to the corresponding affirmative rights.

It has long been held that the existence of a constitutional right does not, in and of itself, compel the recognition of a converse "negative" right. As the Court stated in *Singer v. United States*, 380 U.S. 24 (1965), "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Id.* at 34-35. Indeed, when the Court, "follow[ing] the approach of *Singer*," interpreted the Sixth Amendment right to counsel to include a right to proceed *pro se*, the Court stressed that "[t]he inference of rights is not, of course, a mechanical exercise" and that each "implied right must arise independently from the design and history of the constitutional text." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975).

It is readily apparent that the design and purpose of the First Amendment do not support equivalence between the "affirmative" rights to speak and associate freely and the "negative" rights *not* to speak and associate. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . " *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). This purpose is necessarily

thwarted when speech is suppressed, since, in that event, the "marketplace of ideas" is impaired and citizens are deprived of information they need for "informed and reliable decisionmaking." *Bates v. State Bar of Arizona,* 433 U.S. 350, 364 (1977).

A compulsion to speak, unlike a prohibition of speech, does not stifle the First Amendment interchange and thus does not endanger the "marketplace of ideas."[14] Indeed, in some circumstances, the First Amendment interchange may be aided by compelled speech, if the information thereby communicated would not otherwise be proffered and is necessary in order to promote other constitutionally permissible goals.[15] Thus, the First Amendment rights not to speak or associate with the speech of others must exist to serve interests that are unrelated to protection of the "marketplace of ideas."

This Court has identified two such interests. The first, discussed in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), is preservation of the "editorial autonomy" of the press. The second, identified in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943), and *Wooley v. Maynard,* 430 U.S. 705 (1977), is the individual's interest in personal autonomy regarding matters of thought and belief. Where neither of these

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[14] Government-compelled speech may in some instances affect the "marketplace of ideas" by either amplifying the voices of some speakers or compelling speech that would not otherwise be communicated. But no constitutional principle requires that the "marketplace of ideas" be regulated strictly according to *laissez faire* principles. For example, as long as government does not restrict or limit expression, it may subsidize some speech, but not others. *Regan v. Taxation With Representation,* ___ U.S. ___, 76 L.Ed. 2d 129, 138-39 (1983); *Buckley v. Valeo,* 424 U.S. 1, 92-94 (1976). Similarly, government may decide that some speech is so desirable that it must be compelled. *See* pp. 18-20, *infra.*

[15] Financial disclosure requirements, for example, promote the marketplace of ideas by protecting participants against fraudulent or misleading speech. *See Zauderer v. Office of Disciplinary Counsel, supra.* Similarly, campaign disclosure laws protect the political marketplace of ideas by promoting a better-informed citizenry, deterring political corruption, and facilitating enforcement of campaign contribution limits. *Buckley v. Valeo,* 424 U.S. 1, 66-68 (1976).

interests is implicated, there can be no violation of "negative" First Amendment rights.[16] *See PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980).

Indeed, *PruneYard* illustrates that the rights to remain silent and not to associate with the speech of others are less extensive than the affirmative rights to speak and associate. There the Court held that the First Amendment does not forbid a State from compelling a shopping center owner to permit his property to be used by individuals engaged in political activity protected by the First Amendment. *PruneYard, supra,* 447 U.S. at 85-88. If, conversely, the State had attempted to forbid the owner from using or allowing others to use his property for such purposes, the First Amendment undoubtedly would have been violated. *See Buckley v. Valeo, supra.* Similarly, while an attorney's right not to speak is not violated by requiring him to disclose specified information regarding his contingency fee arrangements (*Zauderer v. Office of Disciplinary Counsel, supra*), the attorney's rights unquestionably would be infringed if the State attempted to prevent him from disclosing the same information. *See Bates v. State Bar of Arizona, supra.* As the Court concluded in *Zauderer,* "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." 53 U.S.L.W. at 4594 n.14.[17]

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[16] In *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), the Court noted that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id.* at 783. But where the "stock of information" is not threatened—*i.e.,* where no "affirmative" First Amendment rights are being abridged—the interests served by First Amendment "negative" rights are limited to those mentioned in *Bellotti:* protection of the press and the self-expression of individuals.

[17] The Court has intimated on occasion that there are similarities between certain "affirmative" and "negative" First Amendment rights. *See Abood v. Detroit Bd. of Educ., supra,* 431 U.S. at 234 ("[T]he fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights"); *Miami Herald Publishing Co. v.*

Moreover, the *Zauderer* decision expressly holds that where affirmative speech is not chilled, and freedom of conscience not endangered, any remaining First Amendment interest in not speaking is *de minimis*. While the Court noted that "in some instances, compulsion to speak may be as violative of the First Amendment as prohibitions on speech" (*id.*, citing *Wooley, Tornillo,* and *Barnette*), it held that "the interests at stake in this case are not of the same order" as those advanced in the Court's prior decisions vindicating "negative" First Amendment rights. Freedom of belief was not threatened, since the State was not attempting to prescribe ideological orthodoxy. *Id.* Nor, of course, did the case involve the editorial autonomy of the press. As a result, the Court concluded that "appellant's constitutionally protected interest in *not* providing any particular factual information . . . *is minimal.*" *Id.* (emphasis added).[18]

Tornillo, 418 U.S. 241, 256 (1974) ("[T]he Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter"); *Wooley v. Maynard, supra*, 430 U.S. at 714 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind' ").

None of these statements, however, either states or implies that "negative" and "affirmative" First Amendment rights are identical in all respects. The sentence from *Abood* relates only to political contributions; the quoted language from *Tornillo* merely restates the obvious fact that an element of government coercion exists for both state-compelled and state-proscribed speech; and the Court's observation in *Wooley*—far from promulgating a general principle of equivalence between "affirmative" and "negative" First Amendment rights—in fact establishes a limiting principle for the latter, as we shall see in Part II(B)(2), *infra.*

[18] The *Zauderer* Court acknowledged that in some circumstances disclosure requirements would implicate First Amendment rights. "We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." 53 U.S.L.W. at 4594. But where protected speech is "chilled," there has been a violation of the "affirmative" First Amendment right to participate freely in the "marketplace of ideas," and it is therefore unnecessary to rely on any claim that "negative" First Amendment rights have been violated. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974). Conversely, where protected speech has not been "chilled," as in this case, there must be an identifiable impairment of a distinct constitutionally-protected interest in order to support a claim that the "negative" right not to speak has been impaired.

The First Amendment interests implicated by the decision below are no more substantial than in *Zauderer*.[19] Perhaps that is why these interests are not even identified—let alone analyzed—in PG&E's brief. Instead, PG&E invokes an inviolable principle of constitutional law which in fact does not exist: It contends that the Constitution forbids a State from "compel[ling] a person to carry a message against his or her will." PG&E Br. 9.

This Court has rejected precisely the same argument that PG&E presents here. In *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), appellant claimed that under *Wooley v. Maynard,* 430 U.S. 705 (1977), "the State may not force an individual to display any message at all." *Id.* at 87. The Court, however, refused to adopt this blunderbuss approach, relying on several "distinguishing factors" which differentiated *PruneYard* from *Wooley*. *Id.* Moreover, and of great relevance for this case, in the Court's two prior cases relating to utility billing envelopes, the Court acknowledged the power of utility commissions to require the inclusion of officially-prescribed materials in the billing envelope, as well as their authority to mandate the inclusion of specified information in utility advertisements. *Consolidated Edison, supra,* 447 U.S. at 543 (New York PSC could not prove that presence of Con Ed's inserts "would preclude the inclusion of other inserts that [the utility] might be ordered lawfully to include in the billing envelope"); *Central Hudson, supra,* 447 U.S. at 571 (PSC could require utility advertisements to "include information about the relative efficiency and expense of the offered service").

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[19] Indeed, they are even weaker. While the attorney in *Zauderer* was compelled to adopt a state-prescribed message as his own and convey it to potential clients, PG&E is merely being required to transmit the messages of a third party, messages that will not be associated with PG&E, and that will in fact carry a statement that PG&E has not endorsed them. CPUC App. 39. *See* pp. 34-35, *infra.*

PG&E's argument that government may never require a person to convey a message not his own would also, if accepted, cut a wide swath through the United States Code, many provisions of which compel speech by private parties. Numerous statutes and regulations require those engaged in commercial transactions to communicate prescribed messages or to make certain enumerated disclosures.[20] Nor are the occasions for such compelled speech limited to financial transactions or to the provision of commercial information necessary to prevent deception.[21] There are also a host of situations in which private entities are required to serve as

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[20] *See, e.g.*, 15 U.S.C. §§ 77j, 77aa (listing material required to be included in securities prospectuses); 17 C.F.R. § 229.501(c)(5) (requiring issuers of securities to print specific legends stating that their prospectuses have neither been reviewed nor approved by the SEC); SEC Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b) (requiring disclosure of material facts in connection with the purchase or sale of securities); 15 U.S.C. § 1232 (requiring specific information to be disclosed on stickers placed on new automobile windows); 15 U.S.C. § 2302 (requiring specified warranty information to be provided with consumer products); 15 U.S.C. § 1637 (requiring specified disclosures for open end consumer credit plans); 15 U.S.C. § 1664 (requiring specific cost disclosures in advertisements for credit); and 15 U.S.C. § 1667(a) (requiring specified disclosures in consumer leasing transactions and advertisements).

[21] *See, e.g.*, 15 U.S.C. § 1333(a)(1) (requiring one of four prescribed health warnings to appear on all cigarette packages); 15 U.S.C. § 1333(a)(2), (3) (requiring similar warnings to appear on cigarette print advertisements and billboards); 15 U.S.C. § 1453 (prescribing the content of labels under the Fair Packaging and Labeling Act); 21 C.F.R. §§ 201.1-201.317 (requirements for labeling and directions for using prescription and over-the-counter drugs); 15 U.S.C. § 2063(c) (prescribing form and content of labels under the Consumer Product Safety Act); 21 C.F.R. §§ 369.1-369.22 (warnings required to be given with specified drugs); 21 C.F.R. §§ 801.1-801.430 (requirements for labeling and directions for using medical devices); 15 U.S.C. § 1261(p)(1) (requiring special warning labels and precautionary measures to be listed on hazardous substances); 21 U.S.C. § 343 (food labeling requirements); and 21 U.S.C. § 362 (cosmetic labeling requirements). Compelled speech may also occur in the political arena. *See, e.g.*, 2 U.S.C. § 434 (contribution and expenditure reporting requirements for House, Senate, and presidential campaign committees); *see also Bellotti, supra,*

conduits for the speech of third parties, as opposed to government-originated messages.

The SEC's proxy rules, for example, require covered corporations to include in their proxy materials certain shareholder proposals and statements in support thereof. SEC Rule 14a-8(b)(1), 17 C.F.R. § 240.14a-8(b)(1).[22] Under the Landrum-Griffin Act, national and international labor unions are required to distribute by mail to their members the campaign literature of any candidate for union office who requests such distribution, without regard to whether the candidate is favored by the union hierarchy. 29 U.S.C. § 481(c).[23] Similarly, cable operators are required by the Cable Communications Policy Act of 1984 to make a certain percentage of their channels available for "commercial use by

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435 U.S. at 792 n.32 (corporate advertisements in political campaigns may be required to identify source).

[22] Such shareholder proposals—which may be vigorously opposed by the corporation being forced to mail them—often concern matters of great public controversy, discussion of which clearly enjoys First Amendment protection. *See, e.g., SEC v. Medical Comm. for Human Rights*, 404 U.S. 403 (1972) (shareholder resolution relating to use of company's product in Vietnam); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978) ("Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues").

[23] *Cf. Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (employer must permit employees to distribute union newsletter on premises in furtherance of employees' rights to engage in concerted activity "for mutual aid and protection" if distribution will not interfere with production or discipline); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (same rule applies to union organizational literature). Indeed, even nonemployees may in certain circumstances use the employer's property to communicate with employees. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). It has never been suggested that an employer has a First Amendment right to prevent his property from being used for the speech of others, even though, like PG&E, he may perceive that speech as adverse to his interests. *Cf. Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (First Amendment has no role to play in resolving conflicts between employer's property rights and employees' or organizers' § 7 rights).

persons unaffiliated with the operator . . . ." 47 U.S.C. § 532(b)(1). The same statute also authorizes local governments to require cable operators to designate additional channels "for public, educational, or governmental use." 47 U.S.C. § 531(b).[24] And the FCC requires cable operators to carry locally-available broadcast signals under the "must carry" rules. 47 C.F.R. §§ 76.51-76.67.

PG&E's invocation of a supposedly ironclad rule preventing government from compelling either speech itself or "association by speech"[25] in all instances is thus unsupported by rudimentary First Amendment analysis, is contrary to numerous decisions of this Court, and would, if accepted, result in the invalidation of a score of federal statutes and regulations. Instead, as we have seen, the protection afforded "negative" First Amendment rights serves two discrete and limited interests—the preservation of editorial autonomy and individual freedom of thought. *See* pp. 14-15,

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[24] The Congress that passed the Cable Act was quite aware of the constitutional issues posed by its requirement that cable franchisees lease channels to rival commercial operators and its authorization of local entities to require their franchisees to offer further leased access for public, educational, and governmental transmissions. *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 31-36, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4655, 4668-73. After careful consideration of these issues, however, the Committee concluded that the "narrowly designed access requirements" of the Cable Act "secured the First Amendment right of the viewers and listeners to a diversity of information sources," and thus did not violate the First Amendment. *Id.* at 36, 1984 U.S. Code Cong. & Ad. News at 4673.

[25] The right not to associate with the speech of others is no more absolute than the right not to speak. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), the Court held that public employees may be required to pay a "service fee" to a union for services related to negotiation and administration of its collective bargaining agreement, notwithstanding the adverse impact on the employees' First Amendment interests. Id. at 222-23, 232. *See also Ellis v. Railway Clerks*, ___ U.S. ___, 80 L. Ed. 2d 428, 446 (1984) ("[B]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights").

supra. Neither of these interests is implicated by the decision below.

B. The Decision Below Does Not Compromise PG&E's Editorial Judgment Nor Invade Its "Individual Freedom of Mind."

1. The Decision Below Does Not Violate *Tornillo*.

(a) The CPUC's Order Does Not Suffer From The Constitutional Defects Of The Statute Invalidated In *Tornillo*.

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court struck down a Florida statute that compelled newspapers to print replies by candidates for public office who had previously been criticized. The Court gave three reasons for the statute's invalidation. First, "the compelled printing of a reply" penalized the affected newspaper, depriving it both "of the cost [of] printing and composing time and materials and [of] space that could be devoted to other material the newspaper may have preferred to print." *Id.* at 256. Second, this penalty was imposed upon a newspaper in direct response to its editorial content; as a result, "editors might well conclude that the safe course is to avoid controversy," and "political and electoral coverage would be blunted or reduced." *Id.* at 257. Third, even if the Florida statute had not imposed a content-based penalty, it nevertheless would be unconstitutional "because of its intrusion into the function of editors." *Id.* at 258. This editorial function, the Court said, is a "crucial process" in the composition of a newspaper, and must therefore remain free from government interference.[26]

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[26] As the Court stated:

> "A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . . ." (*Id.* (footnote omitted))

The reasons which led the Court in *Tornillo* to invalidate Florida's right-of-reply statute are all absent here. *First,* while the statute in *Tornillo* required newspapers to subsidize third-party access, no such subsidy is involved in this case. Under the CPUC's order, TURN must reimburse PG&E "for all reasonable costs the company incurs beyond its usual costs of billing that result from the addition of TURN's materials." CPUC App. 39. Thus, unlike the statute in *Tornillo,* the CPUC's order extracts no penalty from the utility at all, since PG&E will not have to expend any of its own funds to finance TURN's speech. Nor does the decision below preclude PG&E from inserting any material of its own in the billing envelope. *See* Part I(A), *supra.* Thus, there is no danger in this case that TURN's inserts will "tak[e] up space that could be devoted to other material [PG&E] may have preferred to print." *Tornillo, supra,* 418 U.S. at 256.

Second, TURN's access to the billing envelope is not dependent on or triggered by the content of PG&E's speech. Indeed, TURN must determine the months during which it desires access at the start of the two-year experimental period, well in advance of any speech of PG&E's to which it might want to reply. CPUC App. 39-40. There is thus no danger in this case, as there was in *Tornillo,* that third-party access will " 'dampen[ ] the vigor and limit[ ] the variety of public debate' " (*Tornillo, supra,* 418 U.S. at 257), since TURN's access is neither designed nor intended to be responsive to particular instances of PG&E's speech and would continue to exist even if PG&E stopped putting its newsletter in the billing envelope. *See* Part III(A)(1), *infra.*

Third, and finally, this case involves no intrusion into PG&E's editorial judgment. Unlike the respondent in *Tornillo,* TURN has been granted no right to invade the pages of PG&E's newsletter, *Progress.* As just noted, PG&E retains full and complete freedom to publish whatever it likes in its newsletter, whenever it chooses to do so. *See* Part I(A), *supra.* The order in this case therefore does not intrude, as did the statute in *Tornillo,* "into the function of editors." *Id.* at 258.

(b) The Editorial Judgment Protected By *Tornillo* Does Not Apply To Utility Billing Envelopes.

Despite these profound differences between *Tornillo* and this case, PG&E nevertheless contends that it has the same right to control what goes into its billing envelope that the publisher in *Tornillo* had to determine what was printed in its newspaper. But PG&E's analogy between a newspaper and its billing envelope is unpersuasive.

The billing envelope exists primarily for the furtherance of a commercial transaction, *i.e.,* the receipt and payment of the utility's bill. Indeed, the presence of the bill in the envelope is the *sine qua non* of this whole controversy: If the bill did not exist, the "extra space" would not be available for use free of additional postage, and bill inserts would not benefit from "the increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately." CPUC App. 4 n.2.

The Court has previously intimated that *Tornillo* does not apply to commercial speech, since it does not prohibit government from requiring "that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771 n.24 (1976); *see also Central Hudson Gas & Electric Corp. v. Public Service Commission, supra,* 447 U.S. at 571. Thus, the freedom of editorial judgment which protects newspapers from government interference does not apply to speakers engaged in commercial transactions. And the billing envelope, unlike a newspaper, exists primarily to fulfill a commercial function.

For this reason, state regulation of the billing envelope has traditionally been pervasive, extending to both the economic and the expressive components of the billing process. Of course, the State regulates every aspect of the bill itself, with the State determining the rates charged for service, the format for itemizing the amount of service used, the date by which payment must be made, and the procedures for determining the accuracy of the bill. But the States have also routinely required that billing envelopes

be used to communicate both state-composed messages and communications prepared by utilities under direct state supervision.[27] Thus, the CPUC has frequently ordered regulated utilities to use their billing envelopes to provide notice to their customers of matters ranging from the availability of utility services[28] to the impact of federal legislation on utility rates and products.[29] Indeed, the power of state utility commissions to regulate the billing process for communicative purposes is so well-established that the Court in *Consolidated Edison* referred without dissent to the fact that the New York Public Service Commission could lawfully order the utility to include "other inserts" of the Commission's choosing in the billing envelope. *Consolidated Edison, supra,* 447 U.S. at 543.[30]

[27] In California, for example, the Legislature has required utilities to notify their customers of all applications for increased rates, and specified that the required notice shall include a statement of the increase "in both dollar and percentage terms, a brief statement of the reasons the increase is required or sought, and the mailing address of the commission to which any customer inquiries relative to the proposed increase . . . may be directed." Cal. Pub. Util. Code § 454(a). *See also* Cal. Pub. Util. Code § 786(b), (c) (requiring telephone companies to give their subscribers specified notices).

[28] *See, e.g., Decision No. 84-04-053* (Apr. 18, 1984) Slip Op. at 21 (availability of lifeline program); *Decision No. 82-03-015,* 38 Cal. P.U.C. 2d 318, 327 (1983) (availability and rates of OCMS, a discount telephone service); *Decision No. 93533,* 6 Cal. P.U.C. 2d 741, 762 (1981) (notice that elderly and handicapped customers may designate third parties to receive notices in their behalf); *Decision No. 92603,* 5 Cal. P.U.C. 2d 305, 316 (1981) (availability of communications devices for the deaf); *Decision No. 90769,* 2 Cal. P.U.C. 2d 302, 303 (1979) (availability of utility home insulation program); *Decision No. 88551,* 83 Cal. P.U.C. 503, 532 (1978) (home insulation assistance loan program); *Decision No. 88272,* 83 Cal. P.U.C. 306, 314-15 (1977) (same).

[29] *See, e.g., Decision No. 82-09-061,* 9 Cal. P.U.C. 2d 636, 667 (1982) (effects of Economic Recovery Tax Act); *Decision No 82-05-042,* 9 Cal. P.U.C. 2d 214, 237 (1982) (same); *Decision No 90308,* 1 Cal P.U.C. 2d 328, 343 (1979) (notice of additional federal tax credit benefits available for weatherization).

This history—which is discussed in greater detail in the CPUC's brief—demonstrates clearly why a utility billing envelope is not equivalent to a newspaper for First Amendment purposes. While the *Tornillo* rule exists to protect "editorial autonomy" (*Herbert v. Lando,* 441 U.S. 153, 207 (1979) (Marshall, J., dissenting)), no such autonomy has ever been recognized with respect to utility billing envelopes. Far from being outside government control, the billing envelope is both a means of conducting a commercial transaction, all elements of which are regulated by the State, and a medium by which government-prescribed messages are transmitted to the utility's customers. PG&E undoubtedly possesses freedom of editorial judgment, but that freedom extends only to its newsletter, and not to the entire billing envelope.

Indeed, a utility billing envelope is precisely what *Tornillo* says a newspaper is not: "a passive receptacle or conduit . . . ." *Tornillo, supra,* 418 U.S. at 258. Unlike a newspaper, it has no identity of its own as a medium of communication; it is instead merely a vehicle for carrying the bill, the reply envelope, official notices of the CPUC, *Progress,* and whatever else may be enclosed. Nor is a billing envelope offered to readers in "the marketplace of ideas" or expected to have the same thematic or stylistic unity that frequently characterizes a newspaper or magazine. Thus, while an unwanted reply in a newspaper may be the print equivalent of "a colonial wing [on] a gothic cathedral" (*ICC v. J-T Transport Co.,* 368 U.S. 81, 115 (1961) (Frankfurter, J., dissenting)), a third-party bill insert in a utility envelope—especially one relating to the CPUC's process for regulating

[30] PG&E and several amici argue that the numerous occasions on which the California Legislature and the CPUC have exercised control over the billing envelope and its contents are irrelevant to this case. *See* PG&E Br. Opp. 9; Edison Electric Institute Br. 13. But PG&E's claim that it, and it alone, has the right to determine what goes into its billing envelopes is undermined just as much by a requirement that it include a CPUC-originated message in the envelope as by an order compelling it to open up the envelope to third parties.

that utility—is simply one piece of paper among many. For these reasons, the editorial judgment which *Tornillo* protects has no counterpart in the stuffing of a billing envelope.

(c) *Tornillo* Does Not Apply To The Property Of Others.

The foregoing reasons provide a more-than-sufficient basis on which to reject PG&E's reliance on *Tornillo*. There is, however, an additional reason why PG&E's *Tornillo* claim must fail. *Tornillo* does not give an editor dominion or control over the property of others, and the CPUC has conclusively determined, as a matter of state law, that the billing envelope extra space belongs not to PG&E, but to the utility's ratepayers.

While PG&E attacks this finding vociferously,[31] the CPUC's determination is entitled to preclusive effect under California law, and is therefore not subject to review here. In 1981, the CPUC determined in Decision 93887 that the "extra space" has "economic value" which is "paid for . . . by ratepayers" (J.S. App. 67, 72, ¶ 58) and that, as a result, the extra space "is properly considered as ratepayer property." *Id.* This finding was necessary to the CPUC's decision that PG&E's use of the extra space for mailing *Progress* was "improper[ ]" and in violation of PURPA (*id.* at 72, ¶ 59; 67) and that such use "deprives the

[31] PG&E attacks the CPUC's determination that the billing envelope extra space is ratepayer property by envisioning a "parade of horribles" under which the CPUC could commandeer its trucks, offices, computers, etc. PG&E Br. 32. It also relies on this Court's discussion of utility property rights in *Board of Pub. Util. Commissioners v. New York Tel. Co.*, 271 U.S. 23 (1926). *Id.* at 32-33.

Both of these arguments suffer from the same defect: a failure to recognize that the billing envelope extra space is a unique form of "property" which cannot meaningfully be analogized to other, more tangible possessions of the utility. As one CPUC Commissioner wrote below in dissent, "[t]he 'extra' space in the PG&E billing [envelope] is really not a 'property' but is something of an accident." CPUC App. 50 (Calvo, dissenting). Thus, for example, if federal postage rates were suddenly to be charged in increments of less than an ounce, the extra space would disappear (or at least be greatly reduced). That is not true for PG&E's trucks, offices or computers.

ratepayers of[ ] the economic value of the 'extra' space in the billing envelope." *Id.* at 72, ¶ 59. PG&E unsuccessfully sought a rehearing of Decision 93887, attacking these very findings. But it did not seek review of that decision either in the California Supreme Court or in this Court.

Once Decision 93887 became final, the CPUC's findings regarding the extra space became entitled to preclusive effect as a matter of California law.[32] For this reason, the CPUC held in the instant case that its prior decision had already determined that the extra space had economic value and belonged to the ratepayers (CPUC App. 33, Findings of Fact, ¶¶ 1, 3, 4) and that these findings "should not be relitigated in this proceeding." *Id.* at 36, Concl. of Law, ¶ 1; *see also id.*, ¶ 2. In seeking a writ of review in the California Supreme Court, PG&E claimed that the CPUC had erred, under California law, in precluding it from relitigating these issues in this case. *See* Reply Brief in Support of Petition for Writ of Review of Pacific Gas and Electric Company at 34-42. The California Supreme Court denied review, however, and its affirmance of the CPUC's refusal to permit relitigation of an issue of *state* law settled in a prior, and now final, proceeding plainly rests upon an independent and adequate non-federal ground.[33] Moreover, even if it were not protected by the doctrine of

[32] *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630-31, 268 P.2d 723, 728 (1954), *appeal dismissed*, 348 U.S. 849 (1954); *Consumers Lobby Against Monopolies v. PUC*, 25 Cal. 3d 891, 901, 160 Cal. Rptr. 124, 129, 603 P.2d 41, 46 (1979) ("[O]ur denial of such a petition raises the bar of res judicata against relitigation of the same cause of action between the same parties or their privies"); *see also* Cal. Pub. Util. Code § 1709 ("In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive").

[33] PG&E has contended that the CPUC's "ratepayer property" determination in Decision 93887 is not final under California law because: (1) the finding was "only incidental" to the CPUC's "ultimate decision" in that proceeding; and (2) under California law, a determination of a question of law, as opposed to one of fact, "is not conclusive either if injustice would result or if the public interest requires that litigation not be foreclosed." PG&E Br. Opp. 1-2 n.1.

collateral estoppel, the CPUC's state-law "ratepayer property" determination is unreviewable in this Court.[34]

Thus, the *Tornillo* issue must be evaluated in the context of a binding state court determination that the extra space to which TURN seeks access is ratepayer property, which does not belong to PG&E. Resolution of this issue is not difficult. The editorial judgment which *Tornillo* protects applies only to an editor's *own*

Both of these arguments suffer from the same fatal flaw. The issue of whether the CPUC's findings in Decision 93887 are entitled to preclusive effect in this case has itself been litigated in this proceeding, resulting in a formal CPUC finding that its prior determination "should be considered final for the purpose of this proceeding." CPUC App. 36. This finding was in turn attacked by PG&E in the California Supreme Court, but when that court denied PG&E's Petition for Review, it rendered a final decision as a matter of state law that the CPUC's findings in Decision 93887 were entitled to preclusive effect in this case. *See People v. Western Air Lines, supra,* 42 Cal. 2d at 630-31, 269 P.2d at 728 ("[T]he denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. This is so even though the order of this court is without opinion" (citation omitted)). Since that issue has now been conclusively resolved, this Court cannot give the CPUC's determination in Decision 93887 less effect than did the CPUC and the California Supreme Court. 28 U.S.C. § 1738; *Migra v. Warren City School Dist. Bd. of Educ.*, ___ U.S. ___, 79 L. Ed. 2d 56 (1984).

[34] "Because property interests are creatures of state law" *(Board of Curators v. Horowitz,* 435 U.S. 78, 82 (1978)), a State may define and circumscribe PG&E's interests in the billing envelope "extra space" as it sees fit, unless the federal Constitution is violated. *See Estate of Thornton v. Caldor, Inc.*, ___ U.S. ___, 53 U.S.L.W. 4853, 4855 n.8 (June 26, 1985) (state court's construction of state law binding on the Court); *cf. Consolidated Edison, supra,* 447 U.S. at 556 (Blackmun and Rehnquist, JJ., dissenting). But any such constitutional claim has long since been waived; although PG&E contended below that the CPUC's decision violated the Fifth Amendment, no such claim was presented in its Jurisdictional Statement or argued in its brief on the merits. In any event, the Fifth Amendment claim is insubstantial, for the reasons discussed in the Brief Amicus Curiae of the State and Local Legal Center on behalf of the National League of Cities, et al., Part V.

newspaper; it does not authorize editors to interfere with the uses which others may make of their property.

2. The Decision Below Does Not Violate *Wooley*.

(a) A Regulated Monopoly Does Not Possess The "Individual Freedom Of Mind" Protected By *Barnette* And *Wooley*.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), several school children sued to invalidate West Virginia's compulsory flag salute statute, contending that it violated their "right of self-determination in matters that touch individual opinion and personal attitude." *Id.* at 631. The Court upheld this claim, finding that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." *Id.* at 636; *see also Wooley v. Maynard, supra,* 430 U.S. at 714-15.[35]

The Court's holding in *Barnette* was elaborated upon and extended in *Wooley v. Maynard*, 430 U.S. 705 (1977). The Court there held that the "right to refrain from speaking" and the "right to speak freely" are "complementary components of the broader concept of 'individual freedom of mind.'" *Id.* at 714, quoting *Barnette, supra,* 319 U.S. at 637. The first of these rights was implicated in *Wooley* because the state action there at issue—forcing an individual to display a state motto ("Live Free or

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[35] The penultimate paragraphs of the opinion bear repeating in order to underscore the values which *Barnette* invoked:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." (*Id.* at 642)

Die") on his automobile license plate—impaired the "First Amendment . . . right of individuals . . . to refuse to foster an idea they find morally objectionable." *Wooley, supra,* 430 U.S. at 715. *Wooley* and *Barnette* thus protect "a right of self-determination in matters that touch individual opinion and personal attitude" against government intrusion. *Barnette, supra,* 319 U.S. at 631.[36]

PG&E would have this Court extend this "concept of 'individual freedom of mind' " to regulated utilities such as itself. It relies on *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), for the proposition that "corporations are . . . entitled to free speech." PG&E Br. 10-11. This argument distorts *Bellotti's* holding. While the Court held there that corporate speech pertaining to a ballot referendum could not be restricted, the *Bellotti* Court expressly refrained from deciding "whether corporations have the full measure of rights that individuals enjoy under the First Amendment." *Bellotti, supra,* 435 U.S. at 777.[37] Indeed, the Court expressly recognized that there are some " 'purely personal' " rights that "are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." *Id.* at 778 n.14. "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Id.* Consideration of these factors in the context of "negative" First Amendment rights compels the conclusion that they do not protect corporations such as PG&E.

[36] Thus, both of these decisions invoke the principle of "*individual* freedom of mind" (*Barnette, supra,* 319 U.S. at 637 (emphasis added); *Wooley, supra,* 430 U.S. at 714 (emphasis added)); and both decisions speak of "the sphere of intellect and spirit" which the First Amendment protects. *Barnette, supra,* 319 U.S. at 642; *Wooley, supra,* 430 U.S. at 715. Other decisions of the Court sound the identical theme. *See Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that *an individual* should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State") (emphasis added); *Elrod v. Burns,* 427 U.S. 347, 355 (1976) (plurality opinion) ("Even a pledge of allegiance to another [political] party, however ostensible, only serves to compromise the *individual's* true beliefs") (emphasis added).

[37] The *Bellotti* Court found that protecting the ability of corporations to participate in ballot measure campaigns enhances the "marketplace of ideas," inasmuch as "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Bellotti, supra,* 435 U.S. at 777. But, as shown in text, this primary First Amendment value is *not* furthered by permitting corporations to assert "negative" First Amendment rights.

We have seen above that "negative" First Amendment rights exist, *inter alia,* to protect the individual's interest in freedom of thought and conscience. *See* pp. 14-15, *supra.* But this interest is one which corporations share in only marginally, if at all, for artificial entities have no "sphere of intellect and spirit" to protect. As Justice White stated in *Bellotti,* without disagreement from the majority, "the use of communication as a means of self-expression, self-realization, and self-fulfillment is not at all furthered by corporate speech." *Bellotti, supra,* 435 U.S. at 804-05 (White, J., dissenting).[38] Thus, the rights recognized in *Wooley* and *Barnette* are among the " 'purely personal' " guarantees (*id.* at 778 n.14) which do not cover corporations and other artificial legal entities "organized for economic gain." *FEC v. National Conservative Political Action Committee,* ____ U.S. ____, 84 L.Ed. 2d 455, 472 (1985). And because the Court has never extended these rights to artificial entities such as corporations,[39]

[38] In both *Bellotti* and *Consolidated Edison,* the Court differentiated between the First Amendment values of "[t]he individual's interest in self-expression" and "the concern for open and informed discussion . . . ." *Bellotti, supra,* 435 U.S. at 777 n.12 (1978); *see also Consolidated Edison, supra,* 447 U.S. at 534 n.2. Significantly, the Court's holding in both of those cases refrained from invoking the former interest, and instead relied exclusively on the latter. *Bellotti, supra,* 435 U.S. at 776-77 & n.11; *Consolidated Edison, supra,* 447 U.S. at 534 & n.2.

[39] *Miami Herald Publishing Co. v. Tornillo, supra,* is not an exception to this statement. Any right not to speak recognized in that case was, as we have seen, limited to the protection of "editorial autonomy," a right which is limited to newspapers, corporate or otherwise. *See* pp. 22-23, *supra.* Thus, while government may not tell a newspaper what to print in

their " 'historic function' . . . has been limited to the protection of individuals." *Bellotti, supra,* 435 U.S. at 778 n.14.[40]

Lastly, PG&E's regulated status provides an additional reason why it cannot invoke the rights recognized in *Barnette* and *Wooley*. The Court has recognized in numerous cases that pervasive regulation diminishes a business' claim to privacy. For example, in the context of corporate and other associational records, the Court has acknowledged the plenary authority of the State over such documents as a basis for rejecting the claim that such records are privileged under the Fifth Amendment. *See Bellis v. United States,* 417 U.S. 85, 92 (1974). A similar recognition has occurred in the Fourth Amendment context.[41] Thus, the State's regulatory authority over a particular business or

its pages, it may prescribe what a corporation shall include in its annual filings with the SEC, in its proxy statements, and in the labels on its products. *See* pp. 18-20, *supra.*

[40] This conclusion is buttressed by the Court's cases dealing with the privilege against self-incrimination: a right which, like the right not to speak recognized in *Barnette* and *Wooley,* protects the individual against a state command to use his or her expressive powers for the State's ulterior purposes. Just as the right not to speak protects a "sphere of intellect and spirit," the privilege against self-incrimination "respects a private inner sanctum of individual feeling and thought." *Couch v. United States,* 409 U.S. 322, 327 (1973); *see also Murphy v. Waterfront Comm'n,* 378 U.S. 52, 55 (1964). Yet the Court has recognized since the beginning of this century that granting the privilege against self-incrimination to corporations would be an "unjustifiable extension . . . of . . . personal rights . . . ." *Wilson v. United States,* 221 U.S. 361, 385 (1911); *see also Hale v. Henkel,* 201 U.S. 43, 74-75 (1906); *United States v. White,* 322 U.S. 694, 699-700 (1944).

[41] Thus, the Court has held that those who engage in "pervasively regulated business[es]" (*United States v. Biswell,* 406 U.S. 311, 316 (1972)), "closely regulated" industries "long subject to close supervision and inspection" (*Colonnade Catering Corp. v. United States,* 397 U.S. 72, 74, 77 (1970)), or businesses where the "regulatory presence is . . . comprehensive and defined" (*Donovan v. Dewey,* 452 U.S. 594, 600 (1981)) have more limited rights of privacy than businesses generally. *See Marshall v. Barlow's, Inc., supra,* 436 U.S. at 313; *Donovan v. Dewey, supra,* 452 U.S. at 599-602, 606.

subject area may forestall any claim that the business or subject matter constitutes a private preserve into which government may not intrude.

This principle is plainly applicable to this case. The Court has held that the regulated status of a utility does not detract from its "affirmative" free speech rights, because its "position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters." *Consolidated Edison, supra,* 447 U.S. at 534 n.1. But the fact that PG&E is a regulated monopoly, whose rates and services concededly may be supervised by the CPUC (PG&E Br. 3), necessarily limits the scope of its "negative" First Amendment rights, expecially where the subject of the state regulation at issue in this case—the billing envelope—has historically been a focal point for the State's regulatory efforts. When a corporation has "voluntarily chosen to subject [itself] to a full arsenal of governmental regulation" (*Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)), its sphere of corporate autonomy is accordingly limited.

(b) The Decision Below Does Not Impair PG&E's "Individual Freedom of Mind."

Even if, *arguendo,* utilities such as PG&E might in some instances invoke the "negative" First Amendment rights recognized in *Barnette* and *Wooley,* these rights are not violated by the decision below. There are at least four reasons why the most applicable precedent to this case is *PruneYard Shopping Center v. Robins, supra*—in which no violation of those rights was found—instead of the decisions on which PG&E so heavily relies.

First, the nexus in this case between the speaker and the "compelled speech" is far more tenuous than in *Barnette* and *Wooley* and much more analogous to *PruneYard.* In *Barnette,* of course, the State's invasion of the individual's personal autonomy was at its greatest, since the students there were required to signify assent with the State's ideological message by both word and deed. In *Wooley,* the nexus was more distant than in *Barnette,* but it was still pronounced, for there the state-composed message was "required . . . to be displayed openly on Appellee's personal property that was used 'as part of his daily life . . . .' "

PruneYard, supra, 447 U.S. at 87. In *PruneYard,* by contrast, the nexus was attenuated, since in that case the property at issue was "not limited to the personal use" of appellant. *Id.*

In this case, the nexus between PG&E and TURN's speech is distant, at best. Even if PG&E could claim some limited area of "corporate autonomy" analogous to the "sphere of intellect and spirit" protected by *Barnette* and *Wooley,* such a protected area would undoubtedly be limited only to those aspects of its corporate speech or behavior where the corporation exhibits its "personality," such as its newsletter. But no such "personality" is expressed in the billing envelope, which is simply a passive vehicle used primarily to further an impersonal commercial transaction. Indeed, the notion of the billing envelope *qua* envelope as a medium for the expression of PG&E's "personality" is undermined by the envelope's historic subjection to extensive state regulation, including its use for the transmission of state-composed messages. Thus, like the shopping center in *PruneYard,* the billing envelope has never been exclusively used by Appellant.

Second, again as in *PruneYard,* there is no danger here that TURN's speech "will . . . likely be identified" as that of PG&E. *PruneYard, supra,* 447 U.S. at 87. Because the billing envelope has traditionally been used to carry both PG&E-composed and state-mandated messages, ratepayers who receive a TURN message in the billing envelope will not necessarily associate it with PG&E, any more than a pedestrian in a shopping center would necessarily assume that a soapbox orator's message reflected that of the management. Moreover, the CPUC has taken pains to ensure that no such confusion will occur, by requiring that each TURN insert "clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission." CPUC App. 39. Indeed, this point is conceded by one of PG&E's amici, which candidly acknowledges that the CPUC-required disclaimer "removes the false inference that recipients of the billing envelope might otherwise draw that PG&E is the source of TURN's messages or necessarily agrees

with them." Bell Atlantic Br. 7.[42] Finally, the probability that anyone would mistake TURN's speech for PG&E's is further minimized by the fact that TURN presumably will use its billing envelope access to express positions which are different from and inconsistent with those of the utility. And if, in spite of all this, PG&E still believes that the ratepayers will nevertheless persist in confusing its speech with that of TURN, it may, like the shopping center owner in *PruneYard,* "expressly disavow any connection with the message" or put its own, responsive insert in the envelope. *PruneYard, supra,* 447 U.S. at 87.

Third, in this case, unlike *Barnette* and *Wooley,* the State has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette, supra,* 319 U.S. at 642. Instead, as in *PruneYard,* "no specific message is dictated by the State," and there is thus "no danger of governmental discrimination for or against a particular message." *PruneYard, supra,* 447 U.S. at 87. The decision below is thus not part of an effort which is itself at odds with the diversity fostered by the First Amendment. Moreover, since PG&E is "not . . . being compelled to affirm [its] belief in any governmentally-prescribed position or view" (*id.* at 88), but only to provide access to others on a non-discriminatory basis (*see* Part III, *infra*), this case does not involve an impairment of individual conscience of the kind that so troubled the Court in *Barnette* and *Wooley*. Thus,

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[42] PG&E's own submission on this point, however, requires correction. PG&E writes:

> "It is highly likely that the public will receive a mistaken impression that the State's selection of TURN to send its message in the billing envelope is supported by PG&E. Even a disclaimer, as proposed by the commission, would not remove this impression. Rather, a disclaimer would force PG&E to speak even though it prefers to remain silent." (PG&E Br. 19 (citation omitted))

This verbal sleight-of-hand attempts to conceal one crucial fact: The CPUC did not "propose" that PG&E issue a disclaimer; instead, it *required TURN* to provide one. How PG&E can contend, in light of this requirement, that "it is highly likely" that the public will misidentify TURN's messages is nowhere explained in its brief.

for all of PG&E's reliance on the "right not to speak," it is not in actuality being forced to *say* anything, unlike the plaintiffs in those cases, who were forced to engage in speech or conduct that, in effect, required them to adopt a state-prescribed viewpoint as their own.

Fourth, and finally, it is conclusively established for purposes of this appeal that the extra space in the billing envelope to which access has been granted is not PG&E's property. *See* pp. 26-28, *supra*. In *Wooley*, the message that was objected to had to be displayed on the plaintiff's own automobile, while in *PruneYard* (where, nevertheless, no constitutional violation was found), access was granted to the shopping center owner's private property. That is not the case here. Thus, this case provides even less basis than *PruneYard* for a successful claim that the First Amendment right not to speak has been violated.

C. Any Alleged Infringement Of PG&E's Rights Not To Speak And Not To Associate With The Speech Of Others Is Justified By The Important Governmental Interests That The CPUC's Order Serves.

1. The CPUC's Order Need Not Be The "Least Restrictive Means" Of Advancing A "Compelling" State Interest.

Because PG&E fails to recognize the distinction between "affirmative" and "negative" First Amendment rights, it asserts that the CPUC's order must be subjected to the exacting scrutiny traditionally reserved for restrictions on speech that are not content- or viewpoint-neutral. PG&E's mechanical invocation of the "compelling state interest" standard, however, is fundamentally at odds with this Court's approach in cases involving "negative" First Amendment rights. Instead of ritualistically applying formulas derived from the affirmative First Amendment context, the Court has evolved a "sliding scale approach to balancing," in which "the extent to which compelled expression must serve the public interest . . . depends on the extent to which the individual interests are infringed." *Gaebler, supra*, 23 B.C.L. Rev. at 1016. "The more serious the infringement of individual interest, the more vital the asserted advancement of government interests must be to outweigh the infringement and vice versa." *Id.*

A review of this Court's decisions involving "negative" First Amendment claims illustrates the balancing approach actually

employed by the Court in resolving such challenges. In each case, the degree of scrutiny applied to the asserted governmental interests varied in accordance with the degree of the intrusion into the individual's protected interest in personal autonomy regarding matters of thought and conscience. Thus, for example, in *Barnette*—a case in which the required affirmation of belief was so repugnant to the concept of "individual freedom of mind" that extended analysis of the competing governmental interest in promoting national unity was unwarranted—the Court declared that such "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." 319 U.S. at 633. In *Wooley*—a case that the Court characterized as involving a less serious infringement upon personal liberties than *Barnette* (*see Wooley, supra*, 430 U.S. at 715)—the State's countervailing interests received greater attention from the Court and were evaluated under the less demanding standard of *United States v. O'Brien*, 391 U.S. 367 (1968). *See* 430 U.S. at 715-17. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—where the First Amendment impact of compelling employees to support the collective-bargaining and contract-administration activities of the union was weaker still—the Court simply deferred to the legislative judgment, acknowledged in prior cases, that the infringement on First Amendment rights was justified by "the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222.[43] In *Zauderer*—in which an attorney's constitutionally protected inter-

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[43] *Abood* vividly illustrates the shifting balance by which the Court evaluates claims that "negative" First Amendment rights have been abridged. For while the Court upheld compelling public employees to pay a service fee for collective bargaining expenses without invoking strict scrutiny, the Court also ruled in the very same case that compulsory subsidization of ideological activities unrelated to collective bargaining was constitutionally *impermissible* "regardless of any asserted governmental justification." *Id.* at 254 (Powell, J., concurring). The majority obviously perceived a greater infringement of the public employees' First Amendment rights in being compelled to finance political and ideological causes than in being required to contribute to the collective-bargaining activities of the union and therefore applied a markedly less restrictive test to the latter subsidy.

est in not providing particular factual information was found to be "minimal" (53 U.S.L.W. at 4594)—the Court applied an even more lenient standard, concluding that an advertiser's First Amendment rights are adequately protected as long as the disclosure requirements are "reasonably related to the State's interest in preventing deception of consumers." *Id.* And in *PruneYard*—where the Court could discern little, if any, impairment of the shopping center owner's First Amendment rights—the Court upheld the State's forced access requirement without engaging in any balancing at all.

The Court, therefore, has not consistently used the "compelling state interest" test in adjudicating claims based on "negative" First Amendment rights. Nor has it required the State to demonstrate in every case that its chosen alternative is the "least restrictive means" of advancing its interests. *See Zauderer, supra,* 53 U.S.L.W. at 4594 n.14. Similarly, the Court has recently emphasized that "least restrictive means" analysis is not even a component of the *O'Brien* test referred to in *Wooley*. *See United States v. Albertini,* ____ U.S. ____, 53 U.S.L.W. 4844, 4848 (June 24, 1985).

Under the Court's balancing approach, the "question in each case must be whether the compelled participation in expression infringes unduly upon individual interests." *Gaebler, supra,* 23 B.C.L. Rev. at 1016. In this case, the minimal infringement, if any, on PG&E's "negative" First Amendment rights requires only the most cursory examination of the countervailing governmental interests. But even under a more demanding level of review, the decision below withstands constitutional scrutiny, for any impact on PG&E's rights is more than outweighed by the several important governmental objectives directly advanced by the CPUC's order.

2. **The CPUC's Order Is Narrowly Drawn To Further Important Governmental Interests.**

The interests served by the CPUC's order are plainly constitutionally sufficient. As the Commission's decision explained, a number of significant governmental interests are directly advanced by opening the extra space to a multiplicity of voices, including promoting ratepayer representation in CPUC proceedings and expanding the information made available to utility

customers on energy-related issues. CPUC App. 27. These interests in turn implement significant constitutional values in no less than four different ways.

First, as the CPUC noted, permitting entities other than PG&E to obtain access to the billing envelope will expose the ratepayers "to a variety of views" and thus assure "more complete ratepayer understanding . . . [of] energy issues involving their utility." CPUC App. 22, 29. Promoting an informed citizenry is plainly a constitutional interest of the highest order. *See, e.g., Bigelow v. Virginia,* 421 U.S. 809, 824 (1975) (State "may seek to disseminate information so as to enable its citizens to make better informed decisions"); *Buckley v. Valeo, supra,* 424 U.S. at 92-93 & n.127 (upholding public financing of election campaigns as a legitimate effort to "use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people"). State action which enables the ratepayers to receive information through the billing envelope from a variety of sources thus promotes a core First Amendment value.

Second, citizens who receive TURN's messages through the billing envelope may thereupon decide to exercise their associational rights under the First Amendment, by joining the organization and contributing to its efforts.[44] "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."

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[44] The amicus brief filed by the New York Citizens' Utility Board, Inc. and the Utility Consumers' Action Network reveals that the latter organization, which has obtained billing envelope access for the last two years, has attracted approximately 70,000 contributors within the service area of San Diego Gas & Electric. UCAN Br. 2. Because PG&E's service area is larger than that of San Diego Gas & Electric, TURN's access to the billing envelope may attract an even greater number of contributors and members, most of whom undoubtedly could not have been reached by TURN absent billing envelope access. Thus, the CPUC's grant of such access to TURN promotes the important constitutional right of free association on a massive scale, providing many thousands of persons with the opportunity to join an organization about which they might otherwise remain uninformed.

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981). And government may promote the exercise of associational rights for the same reasons that it may "provid[e] financial assistance to the exercise of free speech . . . ." *Buckley v. Valeo, supra*, 424 U.S. at 93 n.127. *See, e.g., Regan v. Taxation With Representation, supra.*

Third, those individuals who exercise their associational freedom and decide to join TURN will assist that organization in promoting the First Amendment rights of itself and its members to participate in administrative and judicial proceedings. "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment" *(United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971)), and this is no less true for similar activity designed to promote responsible participation in administrative proceedings before the CPUC. Indeed, such participation, by a non-profit organization that seeks to advance its members' collective interests, is particularly favored by the First Amendment. *Compare In re Primus*, 436 U.S. 412, 427-30 (1978) *with Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 458-60 (1978).

Fourth, as the CPUC noted, TURN's increased ability to participate in CPUC proceedings resulting from its billing envelope access will promote better-informed Commission decisions. The intervention of ratepayer representative organizations in utility ratemaking cases assists the fact-finding process, by enhancing its accuracy, because such intervenors often possess special expertise regarding the complex and technical issues typically involved in such proceedings. As the Commission specifically found in its decision below: "Participation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff." CPUC App. 36.[45]

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[45] Indeed, the significance of this interest has been recognized not only by the CPUC in this case, but also by Congress, the California Legislature, and the courts. In *Consumers Lobby Against Monopolies v. Public Util. Comm'n*, 25 Cal. 3d 891, 911, 160 Cal. Rptr. 124, 136, 603 P.2d 41, 53 (1979), the California Supreme Court noted that public

Appellant's entire challenge to the sufficiency of these interests consists of its bald assertion that the stated justifications "are neither compelling nor substantial" (PG&E Br. 35),[46] and its suggestion that a variety of other alternatives might achieve the government's objectives equally well without infringing at all upon the utility's First Amendment rights. *Id.* at 37-40.[47] As demonstrated in the preceding paragraphs, however, the substantiality of the interests served by the CPUC's order has consistently been acknowledged by this and other courts, and PG&E's mere *ipse dixit* to the contrary is unavailing. Furthermore, the Commission's order may not be invalidated "simply because there is some imaginable alternative that might be less burdensome on speech. . . . The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government

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interest intervenors "fill a gap in the ratemaking process" because the Commission staff "cannot fully and adequately represent all facets of the public interest . . . ." Similarly, one of Congress' primary goals in enacting the Public Utility Regulatory Policy Act (PURPA) was to encourage intervention by consumers in ratemaking procedures. *See* 16 U.S.C. § 2631(a) (granting "any electric consumer of an affected electric utility" the right to "intervene and participate as a matter of right in any ratemaking proceeding"); § 2632 (attorneys' fees); § 2633 (judicial review). *See also* Cal. Pub. Util. Code § 454(c) (requiring the CPUC to permit individual residential public utility customers to testify at any rate increase hearing).

[46] PG&E also contends that *Buckley v. Valeo, supra*, "rejected almost all of these alleged governmental interests as insufficient to regulate First Amendment rights." PG&E Br. 35. But PG&E ignores the critical distinctions between this case and *Buckley*: here, no speech of Appellant's has been suppressed, nor (as was true in *Buckley*) have any restrictions been imposed on the amount Appellant may expend to disseminate its own views. *See* Part I, *supra*.

[47] For example, PG&E contends that the interest in promoting participation in CPUC proceedings could be equally well-served by awarding attorneys' and expert witness' fees, ignoring TURN's demonstration below that because such fees are only awarded after-the-fact (and often after lengthy delays), they do not enable financially pressed ratepayer groups to hire the experts and attorneys they need. *See* Exh. 1 at 6.

interests." *United States v. Albertini, supra,* 53 U.S.L.W. at 4848 (citations omitted); *accord, Zauderer v. Office of Disciplinary Counsel, supra,* 53 U.S.L.W. at 4594 n.14. It is enough that the CPUC's order effectively advances several substantial governmental interests. Thus, even if there were some impact on PG&E's First Amendment rights, the CPUC's order is constitutionally permissible.[48]

III

THE CPUC HAS NOT ENGAGED IN VIEWPOINT-BASED DISCRIMINATION, HAS NOT IMPERMISSIBLY CONSIDERED THE CONTENT OF ANYONE'S SPEECH, AND DOES NOT PROPOSE TO DO SO.

PG&E contends that the CPUC has improperly "[e]valuated the [c]ontent of [s]peech." PG&E Br. 22. It actually complains of three distinct matters: *First,* it says that the CPUC made a judgment about the content of PG&E's speech in deciding to open access to the extra space in the billing envelope. *See id.* at 22-24. *Second,* it asserts that the CPUC also evaluated the content of TURN's proposed speech and made a judgment that TURN's message was superior to that of PG&E. *See id.* at 23-24. *Third,* it contends that in the future the CPUC inevitably will have to make comparative evaluations of the speech of rival applicants for access to the extra space. *See id.* at 25-27. All of this is condemned as constituting "improper content censorship."

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[48] In addition to the interests previously discussed, the Commission's order also serves the substantial interest, identidied in *Consolidated Edison,* of remedying forced subsidization of the utility's speech. *See* 447 U.S. at 543; *id.* at 544 (Marshall, J., concurring); *id.* at 551-54 (Blackmun and Rehnquist, JJ., dissenting). While PG&E asserts that this problem may be remedied by a simple allocation of costs between its ratepayers and its shareholders (PG&E Br. 39), the CPUC concluded in the proceeding below that it was impossible to assign a fixed economic value to the extra space. CPUC App. 33. For this reason, an allocation of costs is not feasible. Thus, the CPUC instead adopted an innovative remedy which, by permitting a ratepayer-supported organization to share in the extra space, both directly addresses the problem of PG&E's monopolization of that resource and simultaneously furthers the significant state interests in encouraging ratepayer representation and expanding the availability of information.

Id. at 25. As will be shown, however, these charges are both factually and legally wrong.

A. In Ordering PG&E To Give TURN Access To Its Billing Envelope Four Months Per Year, The CPUC Did Not Consider The Content of PG&E's Speech Or Prefer The Viewpoint Of TURN.

The CPUC's decision to require PG&E to allow others access to the extra space involved no subjective evaluation of the content of PG&E's speech—let alone an official condemnation of the viewpoints expressed by the utility. Rather, its decision followed a determination in Decision 93887 that the extra space is ratepayer property which PG&E was using for its own purposes—*i.e.,* other than for delivery of bills and legally mandated notices.[49] CPUC App. 3-4. But Decision 93887 contained no evaluation of the wisdom or desirability of Appellant's speech, and neither does the CPUC's opinion in the present case. Indeed, in the decision below, the CPUC explicitly *rejected* PG&E's invitation to evaluate the merits of its speech.[50] Similarly, the CPUC did not express a preference for the content of TURN's proposed speech.

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[49] In Decision 93887, the CPUC addressed a claim that *Progress* contained "political advertising" in violation of 16 U.S.C. §§ 2623(b)(5), 2625(h). J.S. App. 64-65. However, this claim served only to draw the CPUC's attention to the broader issues raised by the "extra space" in the billing envelope. The ultimate outcome of Decision 93887 was that the *entire* "extra space"—and not simply that space occupied by "political advertising" (*see* note 1, *supra*)—was found to be "ratepayer property." *Id.* at 67. As a result, the CPUC's ultimate decision went far beyond "political advertising" and extended to all uses of the billing envelope other than transmission of bills and legally required notices. For this reason, TURN's access to the billing envelope does not depend on the presence of "political advertising" in *Progress,* let alone on the viewpoint expressed.

[50] PG&E attempted to introduce evidence in this case that readers of *Progress* rated the quality of articles quite favorably and found the information useful. Tr. 597. TURN objected to this evidence on the ground that it was irrelevant, precisely because it was *not* asking the CPUC to balance the merits of its own speech versus PG&E's. *Id.* at 584. The CPUC's administrative law judge excluded the evidence and the CPUC affirmed this ruling. CPUC App. 9-11.

PG&E's argument to the contrary rests on the CPUC's statements that its intent in opening up the billing envelope was to "use[ ] the extra space more efficiently for the ratepayers' benefit" and that granting access to TURN would further this goal because the "ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." CPUC App. 22. But PG&E's argument confuses a bias in favor of TURN's speech—which the CPUC at no time exhibited—with a preference for more speakers. The CPUC was not required to, and did not, evaluate the competing merits of PG&E's and TURN's envelope inserts in order to conclude that permitting two speakers to utilize the extra space, rather than one, would better serve the ratepayers' interest. *See* CPUC App. 22, 27-28. The CPUC finding on which PG&E relies does not disparage PG&E's speech or express a preference for TURN's but simply endorses diversity over exclusivity.[51]

PG&E also relies on the Court's strictures against viewpoint-discrimination or content-based prohibitions of speech, which the Constitution almost invariably forbids.[52] But that constitutional principle does not prevent the CPUC from making reasonable

[51] Amicus Sierra Pacific claims that the CPUC "considered the 'positions which TURN takes regarding PG&E' " and thus evaluated the merits of TURN's speech. SPPC Br. 6 (quoting CPUC App. 18 (emphasis deleted)). This is highly misleading. The cited portion of the CPUC's opinion merely *responded* to PG&E's claim that granting access to TURN would be "improper because TURN . . . does not represent a clearly defined class" of ratepayers. CPUC App. 17. The CPUC's answer was that "there are many positions which TURN takes regarding PG&E that would be shared by substantially all [residential] ratepayers." *Id* at 18. This hardly constitutes a viewpoint preference by the CPUC and in any event was merely a *response* to a PG&E argument which invited the CPUC to evaluate the character of TURN's prior participation in CPUC proceedings.

[52] Even *restrictions* on speech that are based on the *subject matter* (as opposed to the viewpoint expressed) are frequently permissible, at least where a public forum is not involved. *See, e.g., United States v. Albertini,* ___ U.S. ___, 53 U.S.L.W. 4844 (June 24, 1985); *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119, 133-25 (1977); *Young v. American Mini Theatres,* 427 U.S. 50, 70 (1976); *Greer v. Spock,* 424

and viewpoint-neutral distinctions based on speaker identity in order to ensure that the purposes it sought to achieve in opening up the billing envelope are satisfied. Indeed, even if the CPUC had considered the proposed content of TURN's speech (about which it did not even inquire), there would be no constitutional violation, for the "free speech" portion of the First Amendment does not command the same neutrality of government vis-a-vis speech that the Establishment Clause commands with regard to religion. *Buckley v. Valeo, supra,* 424 U.S. at 92. Thus, in many instances government may make explicit content-based choices that go far beyond anything the CPUC has done here.[53]

The CPUC's decision that the speech of other voices, such as TURN's, should be allowed access from time to time to the extra space thus transgresses no First Amendment standard. This decision *restricted* no one's speech. Nor did it express a preference for the viewpoint of any particular speaker. It attempted to do no more than enhance public debate and promote diversity of expression. The legitimacy of these objectives is beyond question. *See Buckley v. Valeo, supra,* 424 U.S. at 92-94 & n.127 (1976); *Associated Press v. United States,* 326 U.S. 1, 20 (1945).

U.S. 828, 838 n.10 (1976); *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974).

[53] For example, Congress may subsidize the lobbying activities of veterans' organizations but not those of others, so long as the purpose is not to suppress disfavored ideas. *Regan v. Taxation With Representation,* ___ U.S. ___, 76 L. Ed. 2d 129, 138-39 (1983). Similarly, access to a school system's internal mail system may be granted only to the recognized employee bargaining representative (and also to church groups, the Cub Scouts, and other local groups), but denied to competing employee organizations. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983). *See also Cornelius v. NAACP Legal Defense and Educational Fund,* ___ U.S. ___, 53 U.S.L.W. 5116 (July 2, 1985).

B. The Propriety Of The CPUC's Future Actions In Allocating Access To The Extra Space Is Not An Issue In This Case; In Any Event The CPUC Will Not Be Compelled To Evaluate Competing Applicants By Means Which Violate The Constitution.

1. The Issue Is Prematurely Raised.

PG&E suggests that in the future, the CPUC inevitably will have to select among competing applicants for access to the billing envelope and that this selection process will necessarily (and unconstitutionally) be based on the content of the applicants' speech. PG&E Br. 24-25. In the present case, however, *only* TURN sought access (CPUC App. 21), and the CPUC expressly refrained from considering the issues that may be raised when others follow in TURN's footsteps. *Id.* The CPUC did state, however, that if others applied, it might be "both necessary and desirable" to adopt a "checkoff mechanism"—which TURN itself originated—that would be open to *all* qualified ratepayer organizations interested in participating in CPUC proceedings. *Id.*[54]

At this stage, the CPUC has decided only that access to the PG&E envelope should be limited to groups that seek to solicit funds to be used for residential ratepayer representation in proceedings before the CPUC involving that utility.[55] Within that

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[54] The "checkoff mechanism" which TURN proposed is described in TURN's Complaint before the CPUC. J.S. App. 75, 77-78, 82-89. TURN envisioned that the "checkoff" would be open to *all* residential ratepayer organizations meeting minimum threshold standards that were wholly free from content- or viewpoint-scrutiny. *See id.* at 83-84; *see also* Post-Hearing Brief of TURN (filed Sept. 28, 1983) at 23-24. Indeed, TURN expressly told the CPUC that "[a]ny regulation of access must be content-neutral and directly related to the purpose of the program itself" (*id.* at 22), and the CPUC agreed. CPUC App. 21-22.

[55] In *Committee of More Than 1 Million California Taxpayers to Save Prop. 13 v. PG&E*, Decision No. 84-10-062 (J.S. App. 157-64), the CPUC denied an application for billing envelope access by a group that favored a statewide ballot proposition on the ground that the applicant sought access only to further its electoral campaign and not to participate in CPUC proceedings. *See id.* at 160-61. Contrary to

class of potential speakers, only TURN has sought access, and no one has been excluded. The constitutional problems that might arise from the CPUC's future efforts to allocate envelope access to hypothetical claimants are therefore not presented by this case.[56]

This Court will not adjudicate constitutional claims unless "the injury or threat of injury [is] 'both real and immediate,' not 'conjectural' or 'hypothetical.' " *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). This case plainly presents no real and immediate issue regarding the CPUC's future allocations of the extra space. Indeed, there is a strong likelihood that such issues will never arise, since the CPUC has indicated its intent to allocate access in a content-neutral manner and it plainly has the ability to do so.

2. The CPUC Access Program Is Fully Capable Of Being Administered In A Constitutional Manner.

PG&E assumes that the CPUC "will be required to pick and choose from the multitude of competing groups" and that it will "license speakers to use the envelope *based solely upon what they intend to say*." PG&E Br. 25 (emphasis added). But this is precisely what the CPUC has not done and says it will not do. *See* CPUC App. 10-11, 21-22 ("We agree with TURN that an essential element of such a mechanism is the development of neutral criteria to determine eligibility"); *see also* p. 44, *supra*. The CPUC has emphasized its desire to proceed in a content-neutral manner by indicating its willingness once others apply for billing envelope access to adopt a "checkoff" mechanism similar

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PG&E's assertion that this decision was based upon the content of the applicant's proposed speech (PG&E Br. 25-26 n.19), the CPUC's denial of the Committee's application in fact demonstrates that the CPUC's access determinations are not based on speech, but upon the role, if any, that the applicant has played or intends to play in CPUC proceedings.

[56] Moreover, PG&E may not assert the constitutional rights of hypothetical would-be users of the billing envelope, for it plainly has no standing to assert the rights of others. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975). Indeed, the utility is *hostile* to the First Amendment claims of access for the other consumer groups whose rights it purports to champion here.

to that proposed by TURN (*see* note 54, *supra*), which would provide access to all qualified applicants without evaluation of the content of their proposed speech. Other content-neutral alternatives are also available to the CPUC; indeed, in its *UCAN* decision (J.S. App. 90-110), the CPUC adopted a quite different, though equally neutral, access mechanism than the one fashioned in this case.[57] *See generally* Comment, *Public Utility Bill Inserts, Political Speech, and the First Amendment: A Constitutionally Mandated Right to Reply*, 70 Calif. L. Rev. 1221, 1259-62 (1982).[58]

The CPUC, then, will doubtless be able to allocate access to utility billing envelopes to all qualified consumer groups without considering or evaluating the content of anyone's speech.[59] But

[57] In its *UCAN* decision, the CPUC granted a newly-created organization called the Utility Consumers Action Network access to the billing envelope of San Diego Gas and Electric (SDG&E), four times a year for a two-year period. At first, UCAN may use its access only to solicit members and funds sufficient to permit an election to be held for the organization's board; once a board is elected, access may then be used to solicit funds to participate in CPUC proceedings affecting SDG&E. J.S. App. 108-09. Thus the *UCAN* decision, like the decision below, was content-neutral; since UCAN had not yet been formed at the time its right of access to the SDG&E billing envelope was conferred, the CPUC obviously could not have predicated its decision on a subjective evaluation of that organization's speech.

[58] Nothing in the CPUC's decisions supports the suggestion of some amici that only those who take positions *adverse* to PG&E will be eligible for access. The Commission's opinion refers only to "consumer representative organizations [seeking access] for the purpose of soliciting funds to be used for residential ratepayer representation in proceedings of this Commission involving PG&E." CPUC App. 2. Groups who believe that the interests of consumers would be served by increasing rates, or promoting nuclear power generation, or by supporting any other position of PG&E are therefore free to seek access under the principles established by the CPUC's decision in this case.

[59] The CPUC's determination to limit billing envelope access "only to groups organized specifically to represent ratepayers in our proceedings" (J.S. App. 160-61) is plainly constitutional. With regard to the utility billing envelope, the government may grant or deny access "on the basis

even if, *arguendo*, the CPUC eventually undertook to select appropriate consumer representatives who would be given exclusive access to the extra space, the First Amendment would not be violated. So long as the CPUC's selections are not "a facade for viewpoint-based discrimination" (*Cornelius v. NAACP Legal Defense and Educational Fund, supra*), but rather reflect a *bona fide* effort to provide for the expression of diverse points of view by a cross-section of qualified representatives, its choices will be constitutional. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Id.* at 5121.

The purpose of providing access to the billing envelope is, of course, to encourage and facilitate effective participation in CPUC administrative proceedings. CPUC App. 27-29. To that end, the CPUC may make judgments as to the quality of past or probable future participation in such proceedings in precisely the same way that legislative and other public agencies exercise discretion as to whom to hear. *See Minnesota State Board for Community Colleges v. Knight*, ____ U.S. ____, 79 L. Ed. 2d 299, 312 (1984). Courts, too, frequently select appropriate representatives from many competing applications. *See* Fed. R. Civ. P. 23(a)(4); 7 C. WRIGHT & A. MILLER, FEDERAL PRAC-

of subject matter and speaker identity," so long as the distinctions "are reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983). It undoubtedly is reasonable for the CPUC to require that the billing envelope extra space—whether it belongs to the utility or the ratepayers—be used for the benefit of the utility's customers, and it is equally reasonable to decide that ratepayer benefit is maximized by restricting access to groups that participate in CPUC proceedings involving the affected utility. The use of the billing envelope may, in short, be restricted "to those who participate in the forum's official business" (*id.* at 53), and speakers may be excluded, like the Committee of More Than 1 Million California Taxpayers to Save Prop. 13, if they are "not a member of the class of speakers for whose especial benefit the forum was created . . . ." *Cornelius v. NAACP Legal Defense and Educational Fund*, ____ U.S. ____, 53 U.S.L.W. 5116, 5121 (July 2, 1985).

TICE & PROCEDURE §1766 (1972).[60] Similarly, courts are not required to accept amicus briefs from all who seek to file, and exercise great selectivity in allowing amici—and, indeed, parties—to participate in oral argument. *See* Sup. Ct. R. 38.4.

To date, the CPUC has not even gone this far. It may never do so. On this record, its conduct and approach reflect a meticulous sensitivity for First Amendment principles. Neither it nor TURN seeks to exclude anyone from the extra space on the basis of the viewpoint expressed or the content of his message. To paraphrase what the Court said of Congress' creation of a scheme for public financing of some but not all participants in federal elections:

> "[The CPUC's decision] is a[n] . . . effort, not to abridge, restrict, or censor speech, but rather to use [the extra space] to facilitate and enlarge public discussion and participation in the [ratemaking] process, goals vital to a self-governing people. Thus, [the decision] furthers, not abridges, pertinent First Amendment values." (*Buckley v. Valeo, supra,* 424 U.S. at 92-93 (footnote omitted))

CONCLUSION

The California Supreme Court's decision denying PG&E's Petition for Review should be affirmed.

Respectfully submitted,

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[60] Those who are not selected as class representatives are not silenced, but merely lose the advantages that Rule 23 confers upon the class representative. That is also true here, for any organization not given access to the PG&E billing envelope remains free to mail its own letters.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,
v.
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,
Appellees.

On Appeal from the Supreme Court of California

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No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF APPELLEE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

STATEMENT OF THE CASE[1]

Factual Background

Pacific Gas and Electric Company ("PG&E"), a regulated "public utility" within the meaning of Cal. Const. art. XII, § 3,

[1] The Commission's initial majority opinion in Decision No. 83-12-047 (Dec. 20, 1983) and its subsequent modifying opinion in Decision No. 84-05-039 (May 2, 1984) are separately reproduced in the appendices to the Jurisdictional Statement ("J.S."), at A1-A34 and A45-A54, respectively. For the convenience of the Court, a single conformed copy of the Commission's decision *as modified* is reproduced in the appendi-

and Cal. Pub. Util. Code § 216, bills its customers for utility service each month by mail and recovers its reasonable costs of billing, including postage, materials, labor and overhead, in rates.

The Public Utilities Commission of the State of California ("the Commission") requires PG&E to enclose each customer's bill in a billing envelope—a practice which creates a medium for delivery not only of the bill but of additional "bill inserts" which may be placed inside the envelope. The billing envelope, the entire space inside the envelope and the capacity of the envelope to carry bill inserts exists solely because the Commission's present regulation of the billing process allows them to exist.[2] If, for example, the Commission were rationally to conclude that billing should be done by postcard (*e.g.*, to save ratepayer postage costs), there would be no billing envelope and hence no medium for the delivery of additional written messages along with the bill.[3] However, the Commission has found that the space in the billing envelope provides an "effective method of communicating with ratepayers" and has "routinely" used that space "to accomplish various informative functions for the benefit of ratepayers." Comm. M.D. A7.[4] Thus, pursuant to present regulatory requirements established or approved by the Commission, PG&E encloses in each customer's monthly billing envelope a bill, a return

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ces to the Commission's Motion to Dismiss ("Comm. M.D."), at A1-A40.

[2] While PG&E's envelopes, bought and paid for by the utility with funds recovered in rates, may be utility property, *see* Comm. M.D. A3, a particular envelope is imbued with the status of a *billing* envelope solely by reason of the Commission's regulation. Moreover, irrespective of the ownership of the envelope, the Commission has traditionally exerted extensive regulatory control over the uses to which the space inside the envelope is put. *Id.* at A7.

[3] This would also be the case if the Commission authorized or required PG&E, like some California utilities, to have its meter readers generate and deliver utility bills in person at the time the meter is read.

[4] The Commission's decision acknowledges, Comm. M.D. A4 n. 2, and PG&E concedes, PG&E Br. 14 n. 11, that there is an "increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately."

envelope and such additional bill inserts as are required by statute[5] or by the Commission.[6]

PG&E's billing envelope and its required contents, taken together, normally weigh a fraction of an ounce.[7] However, present regulations of the United States Postal Service require prepaid postage on each billing envelope in an amount sufficient to cover the delivery of mail weighing a full ounce. Accordingly, PG&E's present billing and postage requirements generate a quantum of weight allotment in the envelope, not normally consumed by the bill or the enclosures otherwise required by the Commission, upon which postage has been prepaid. The Commission has characterized this prepaid quantum of weight allotment as the "extra space" in the billing envelope.[8]

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[5] Cal. Pub. Util. Code § 454; *see also* Cal. Pub. Util. Code §§ 786(b), (c).

[6] *See* note 19, *infra*.

[7] The cumulative weight of these items will of course vary, depending on the number and nature of inserts required for a given month as well as any variations in the billing requirements for individuals or different classes of customers.

[8] The Commission's decision defines the "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." Comm. M.D. A3.

This definition is not intended to suggest that the Commission has any lesser authority over the other portions of the interior of the billing envelope. The Commission has always regulated "the monthly bill and . . . required legal notices" which consume a portion of the first ounce of mailable matter, and there is no reason why these items might not on some occasion weigh more than an ounce. Moreover, the envelope space remaining after the "extra space" is consumed (*i.e.*, that applicable to the second and subsequent ounces of mailable matter) is properly subject to the Commission's jurisdiction for the same reasons as is the "extra space" itself. *See* Comm. M.D. A7, A12, A32-A33, A37.

Nor is the concept of the "extra space" intended to suggest that the Commission's authority to order the inclusion of "required legal notices" is any different from its authority to permit the inclusion of TURN's

PG&E has traditionally communicated with its customers by enclosing its publication *Progress* in the extra space in the billing envelope. The costs of preparing and printing *Progress* are not included in rates and thus are effectively paid by the company's shareholders. However, under present practice, PG&E recovers 100 percent of its estimated postage costs for billing from the ratepayers. It thus recovers in rates the cost of that postage applicable to the extra space, including that portion of the space occupied by *Progress*.

Moreover, the extra space has economic value to the ratepayers far in excess of its applicable postage costs. If that space were used to generate income—*e.g.*, by selling the use of the space to advertisers—the income generated would likely be very substantial.[9] Such income would engender a corresponding reduction in PG&E's revenue requirement and thus in rates.[10] Accordingly, the exclusive appropriation of the extra space by PG&E without charge results in PG&E's obtaining a windfall measured by the economic value of the space and the ratepayers' bearing opportunity costs for a medium of communication which they underwrite. *See* J.S. A67-68.

Prior Commission Decisions

In an earlier decision, Decision No. 93887 (Dec. 30, 1981), as modified by Decision No. 82-03-047 (Mar. 2, 1982), the Commission considered the claim of Toward Utility Rate Normalization ("TURN"), a frequent intervenor in Commission

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insert. The source of the Commission's power to order the inclusion of both such notices is the same.

[9] There are, of course, legitimate reasons why the Commission might find the sale of advertising space objectionable. Such use would do little to increase public awareness of regulatory issues or public participation in Commission proceedings. Similarly, placing the utility bill in a sheaf of advertisements might impede the convenience and efficiency of the billing process or unduly intrude upon ratepayer privacy.

[10] The Commission's decision concludes that "[q]uantification of the economic value of the extra space is subjective and imprecise because it is based on many variables." Comm. M.D. A33, A4 n. 2.

proceedings, that PG&E had violated the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 2623(b)(5) and 2625(h), by recouping from ratepayers indirect expenditures for political advertising (*i.e., Progress*) in the billing envelope. J.S. A67, A72.

The Commission concluded that the economic value of the extra space in the billing envelope should be "considered as ratepayer property," since the ratepayers create that value by paying the postage for delivery of the entire contents of the envelope. J.S. A67. However, rather than deciding in that proceeding "what steps [it] should take to utilize most efficiently for the ratepayers' benefit the 'extra' space . . . in the billing envelope," J.S. A69, the Commission invited the initiation of a collateral proceeding addressing the question of remedy:

> We invite TURN or any other interested party to file an application with this Commission with a proposed solution to the extra space problem. The application would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the "extra space" more efficiently for ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such application.

J.S. A71.[11]

Thereafter, in Decision No. 83-04-020 (Apr. 6, 1983) ("the UCAN decision"), the Commission approved the establishment of a consumer advocacy group to be called San Diego Utility Consumers Action Network, Inc. ("UCAN") and required San Diego Gas and Electric Co. ("SDG&E") to allow the group to use the extra space in its billing envelope four times per year for a two-year period. J.S. A90-A110. SDG&E did not challenge the

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[11] TURN's petition for writ of review of the Commission's failure to adopt a specific remedy was denied by the California Supreme Court on August 13, 1982. *See TURN v. Public Utilities Commission*, S.F. No. 24415 (Aug. 13, 1982). PG&E elected not to seek judicial review of Decison No. 93887 as modified.

Commission's final order in the courts, and UCAN has utilized SDG&E's billing space on eight separate occasions to solicit membership and funds.

The Decision Below

TURN responded to the Commission's invitation issued in Decision No. 93887 and, on May 31, 1983, filed a new and separate complaint with the Commission (Case No. 83-05-013), seeking access to PG&E's billing envelope for purposes of soliciting funds, increasing membership and informing PG&E ratepayers of energy-related issues affecting their bills. TURN's complaint presented three proposals, the first two of which involved the insertion in PG&E's billing envelope of "checkoff" lists of multiple consumer advocacy organizations and the third of which would grant TURN alone access to the billing envelope.

In Decision No. 83-12-047 (Dec. 20, 1983), as modified by Decision No. 84-05-039 (May 2, 1984), the decision below, the Commission granted TURN access to the extra space in PG&E's billing envelope four times per year for an experimental period of two years,[12] rejecting the "checkoff" proposals because they contemplated the participation of multiple organizations and because TURN was the only organization which had applied for access to the billing envelope. Comm. M.D. A21-A22, A24, A35. In so ruling, the Commission indicated that it was "in no way preclud[ing] other proposals from being considered" and that, alternatively, it might in the future modify its decision "to provide

[12] The Commission concluded that its previous final determination in Decision No. 93887 as to the ownership of the extra space was not properly subject to relitigation by PG&E in this case. Comm. M.D. A36. As noted in earlier filings, under California law, that previous determination of state property law is *res judicata*. *See* Cal. Pub. Util. Code § 1709; Comm. M.D. 8-9, A59.

The Commission also rested its decision, independent of the ownership of the extra space, on its state constitutional and statutory authority to regulate public utilities. Comm. M.D. A6-A8, A12, A32-33, A37.

for the implementation of a checkoff program." Comm. M.D. A24.[13]

The decision provided that PG&E be permitted to use the extra space during the remaining eight months of the year as well as any remaining extra space not used by TURN during the months TURN's material is inserted; that PG&E and TURN each determine the content of its own material; that the costs of inserting material in the extra space be borne by the sponsor of the material; that PG&E bill TURN for all reasonable costs to the company caused by the addition of TURN's material; and that TURN's material clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or by the Commission. Comm. M.D. A38-A39.

On November 4, 1984, the California Supreme Court entered its final order summarily denying PG&E's petition for review. Cal. R. Ct. 24(a). Its order constitutes "a decision on the merits both as to the law and the facts presented in the review proceedings." *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 900, 901, 160 Cal.Rpt. 124, 603 P.2d 41 (1979).

This appeal follows.

SUMMARY OF ARGUMENT

The Commission's decision granting TURN periodic access to the extra space in PG&E's billing envelope constitutes reasonable regulation of a public utility subject to the Commission's jurisdiction. The decision falls within the State's police power, is consistent with the Commission's historical regulation of the billing envelope as an instrumentality of the regulatory process, and rationally furthers important State interests. *See* Parts I(A), (B) and (C), *infra*.

[13] Because TURN was the only applicant for access to PG&E's billing space, the issue of how the competing interests of multiple applicant organizations should be resolved is not raised in this case. *See* Comm. M.D. A21-A22, A24, A35. The sole issue here is whether the Commission violated PG&E's First Amendment rights by granting access to TURN.

The Commission's decision does not infringe upon affirmative speech or editorial discretion protected under the First Amendment. It merely raises the speculative possibility that PG&E may infrequently be required to pay a portion of the cost of delivering its chosen message through the U.S. mail. A State's decision "not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation*, 461 U.S. 540, 545-546 (1983). Such a determination is merely reasonable economic regulation within the State's police power. *E.g., Munn v. Illinois*, 94 U.S. 113, 125-130 (1877); *New Orleans v. Dukes*, 427 U.S. 297, 303-306 (1976). *See* Parts II(A) and (B), *infra*.

However, even assuming that the Court were to perceive a cognizable restriction on PG&E's affirmative speech, the decision is facially content-neutral, and, since no impermissible content-based discrimination has occurred or is likely to occur in the future, the decision is justified under the applicable standards for permissible content-neutral regulation of affirmative speech. *See* Part II(C), *infra*.

The Commission's decision does not infringe upon any protected rights to refrain from speaking or to refrain from associating with the views of another. The interest underlying the Court's recognition of those "negative" speech and associational rights—"individual freedom of mind"—is not served where the party asserting the claim is an artificial entity, such as a corporation or a regulated public utility; hence the protection of those rights should not, under the circumstances of this case, be extended to PG&E. *See* Part III(A), *infra*.

Moreover, even if such a claim were available to PG&E, the Commission's decision, rather than seeking to compel PG&E's ideological orthodoxy, merely enables a separate and distinct voice, clearly identified as such, to reach consumers. The principles of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); and *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), have little applicability to the program established by the Commission's decision. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Zauderer v. Office of Disciplinary Counsel*,

471 U.S. ____, 85 L.Ed.2d 652, 105 S.Ct. ____ (May 28, 1985); *Cornelius v. NAACP Legal Defense Fund*, ____ U.S. ____, 53 U.S.L.W. 5116 (July 2, 1985); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (9183); *U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114 (1981). Hence the decision does not infringe upon any negative speech or associational rights. *See* Part III(B), *infra*.

However, even assuming that the Court were to perceive such an infringement, the Commission's decision is justified under the standard of *United States v. O'Brien*, 391 U.S. 367 (1968), or any other test which the Court deems applicable. *See* Part III(C), *infra*.

The Commission's decision does not violate the First Amendment, and the judgment of the California Supreme Court should be affirmed.

ARGUMENT

I

THE COMMISSION'S DECISION CONSTITUTES A PROPER EXERCISE OF THE STATE'S AUTHORITY TO REGULATE THE ECONOMIC ACTIVITY OF PUBLIC UTILITIES

A. Under the Police Power, a State has Broad Authority to Regulate Public Utility Monopolies in the Public Interest.

In *Pacific Gas & Electric Co. v. Energy Resources Commission*, 461 U.S. 190, 205 (1983), this Court recognized the State's broad regulatory power over public utilities:

> Justice Brandeis once observed that the "franchise to operate a public utility . . . is a special privilege which . . . may be granted or withheld at the pleasure of the State." Frost v Corporation Comm'n, 278 US 515, 534, 73 L Ed 483, 49 S Ct 235 (1929) (dissenting opinion). "The nature of government regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a

regulatory body." Jackson v. Metropolitan Edison Co., 419 US 345, 357, 42 L Ed 2d 477, 5 S Ct 449 (1974). See Central Hudson Gas & Electric Corp. v Public Service Comm'n of New York, 447 US 557, 569, 65 L Ed 2d 341, 100 S Ct 2343 (1980) ("The state's concern that rates be fair and efficient represents a clear and substantial governmental interest").

The rationale underlying the State's broad authority is that a public utility is a state-created monopoly, permitted to operate as such solely because of a determination by the State that the public interest is better served by protecting the utility from competition. "This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching." *Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530, 550 (1980) (Blackmun, J., dissenting). *Accord, Cantor v. Detroit Edison Co.,* 428 U.S. 579, 595-596 (1976) ("[P]ublic utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation"); *see also Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 587-588 (1980) (Rehnquist, J., dissenting).

The California Public Utilities Commission was established for this purpose. "Created by the Constitution in 1911, the Commission was designed to protect the people of the state from the consequences of destructive monopoly in the public service industries." *Sale v. Railroad Commission,* 15 Cal.2d 612, 617, 104 P.2d 38 (1940). *See also General Telephone Co. v. Public Utilities Commission,* 34 Cal.3d 817, 824, 827, 195 Cal.Rptr. 695, 670 P.2d 349 (1983); *Consumers Lobby Against Monopolies, supra,* 25 Cal.3d at 905. As one California Supreme Court Justice recently said: "The Commission stands nearly alone among state agencies as a constitutionally empowered, independent, multifunctioned body whose mandate is to represent and protect the public good." *Cory v. Public Utilities Commission,* 33 Cal.3d 522, 529, 189 Cal.Rptr. 386, 658 P.2d 749 (1983) (Reynoso, J., dissenting).

Under its broad state constitutional and statutory mandate, the Commission may do all things "necessary and convenient" to the exercise of its regulatory power, including the regulation of a utility's rates, services, rules, practices, appliances, equipment, facilities, methods of distribution, methods of transmission and physical property. Cal. Pub. Util. Code §§ 701, 728, 729, 761 and 762; Comm. M.D. A57-A59; *see, e.g., Munn v. Illinois, supra,* 94 U.S. at 125-130; *New Orleans v. Dukes, supra,* 427 U.S. at 303-306; *Nebbia v. New York,* 291 U.S. 502, 523-525, 537 (1934); *Sutter Butte Canal Co. v. Railroad Commission,* 279 U.S. 125, 135-138 (1929); *General Telephone, supra,* 34 Cal.3d at 822-827.

As found by the Commission and the California Supreme Court, this mandate extends to the Commission's order here.

B. California Has Historically Regulated the Utility Billing Process, Including the Billing Envelope and Its Contents, Because of the Inherent Relationship of that Process to All Other Aspects of Utility Rates, Service and Regulation.

As the Court has observed in a somewhat similar context, "[t]he present case is a good example of Justice Holmes' aphorism that 'a page of history is worth a volume of logic.' "*U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. at 120-121, *quoting New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921). For here, a brief history of the Commission's regulation of the billing envelope as a channel of communication to utility customers is helpful in placing PG&E's First Amendment claim in its proper context.

At the outset, however, it is important to understand that the billing process is integral to utility service and is inextricably entwined with rates. When a customer signs up for service such as that provided by PG&E, he or she is entitled not only to gas and electric power but also to a monthly bill which informs him or her with sufficient specificity of the amount of power used, the rate charged and the amount due. A utility's failure properly and timely to bill its customers may *inter alia* discourage timely payment, deprive the customers of sufficient information to assess the accuracy of the bill, encourage billing disputes, increase the utility's costs of collection, increase uncollectibles or bad debt,

heighten the frequency of customers having their service erroneously discontinued for nonpayment and substantially inconvenience both the utility and its customers. Such failure constitutes "poor management [which] result[s] in injury to those who pay their bills." *Tujunga Water & Power Co.*, 7 Cal.R.R.C. 580, 589 (1915). In addition, such failure will likely necessitate an increase in rates.

One inherent function of the billing process is the provision of information to the customer. Indeed, the bill itself—which is essentially a demand for payment for services rendered—provides the utility customer with a wide variety of information, such as the amount of service used (as itemized in accordance with Commission regulations), the rate charged (as fixed by the Commission) and the date on which the amount of money claimed falls due (as stated in tariff rules subject to Commission approval). The billing envelope may also contain information as to procedures both for disputing the accuracy of the bill and for making payment, as well as a return envelope to facilitate making payment. The envelope also commonly contains notices of rate, billing, or other service changes, notices of the availability of special programs regulated by the Commission and a wide variety of additional messages, some of which may be printed on the face of the bill and some of which may be communicated on a separate insert placed in the billing envelope pursuant to an order of the Commission.

Apart from its use to facilitate the orderly satisfaction of contractual obligations between the utility and its customers, the utility billing envelope provides what this Court has called a "unique forum[ ] for expression." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981). The envelope provides the means of communicating directly with the class of persons who are the utility's customers and no other. Moreover, the contents of the billing envelope demand the recipient's close attention because they are part of, and may well affect, the ongoing business relationship between the utility and its customer. In California, close scrutiny of the contents of the envelope is demanded in part by the recipient's perception, based on experience, that the State has often used the envelope to communicate messages which are

of considerable importance to the customer. Hence the recipient who fails to scrutinize the contents of the envelope knowingly does so at his or her peril. As acknowledged by the Commission's decision, there is an "increased probability that the recipient will peruse a communication enclosed with the bill over one sent separately." Comm. M.D. A4 n. 2. The envelope thus provides an unusually effective means of communicating with utility customers—a means far more effective than communicating by direct mail with envelopes identifiable as something *other* than the billing envelope.

Indeed, the California Legislature has specifically required each California public utility to include in the billing envelope its notice of filing an application for a rate increase, its statement of the reasons for its seeking the increase and a notice to the consumer of the means by which he or she may receive notice of the time and place of any hearing on the application. Cal. Pub. Util. Code § 454(a). In this way, the Legislature has recognized the inherent effectiveness of the billing envelope as a medium of communication central to the regulatory scheme and has asserted the State's jurisdiction over the envelope as an extension of Commission rate proceedings and an instrumentality of the regulatory process.

The Commission's decision below recognizes the uniquely effective nature of this channel of communication and its role in the regulatory process:

> Because the billing space is so inextricably related to activities subject to routine regulation, we have repeatedly exercised our authority under the State Constitution and Public Utilities Code Section 701 to permit and require the space to be used for the benefit of ratepayers. The billing space has frequently been put to the obvious use of communicating with ratepayers. Recently, we have also solicited proposals that would allow ratepayers to benefit from the economic value of the extra space. (D. 93887)
>
> Use of the billing space to accomplish various informative functions for the benefit of ratepayers now occurs so frequently that it has become a routine matter. Notices of

applications for rate increases and notices of public hearings are regularly inserted without objection in billing envelopes (see, Resolution ALJ-149, October 29, 1982, p. 3)—so routinely, in fact, that we have referred to extra space as being that space which is available *after* legal notices and, of course, the bills and return envelopes have been included. These notices have been included in billings precisely because the billing envelope is such an effective method of communicating with ratepayers. We have also required utilities to include notices of the availability of various conservation programs (D. 92653) and conservation information (D. 89316). We have required our utilities to include an insert informing ratepayers of the effects of a complicated federal tax law (D. 93887). And most recently, we have used the billing space of telephone utilities to notify customers of a new lifeline program designed to assist low-income people to remain on the telephone system in the wake of the divestiture of AT&T. (D. 84-04-053) All of these are examples of the proper use of a valuable means of communication that the extra space provides.

Comm. M.D. A7.

The Commission's assertion of its jurisdiction over the billing envelope as a channel of communication is almost as old as the Commission itself. As early as 1913, the Commission (then known as the California Railroad Commission) ordered a water company "to adopt some method of informing its patrons or consumers of water in writing of the amount of water used in each month, and of the rate and amount to be paid." *Slinack v. Inglewood Water Co.*, 3 Cal.R.R.C. 752, 757 (1913).[14]

Similarly, in *Pacific Gas & Electric Co.*, 17 Cal.R.R.C. 143, 144, 147 (1919), the Commission approved a set of utility tariffs (*i.e.*, rules and regulations), subject to such "changes and amendments as may [thereafter] appear advisable [to the Commis-

[14] The Commission likewise ruled in *Peters-Rhoades Co.*, 27 Cal.R.R.C. 297, 299 (1925), "[w]here the rates and rules of a water utility are based upon monthly payments for service, it is the duty of such a utility to render each consumer a monthly bill."

sion]," requiring that [e]ach bill for electric service will contain on its face" certain specified language.[15] Thus, as early as 1919, the Commission required PG&E to communicate specific information to its customers by what was effectively a bill insert.[16]

Indeed, from the moment the Commission began to regulate rates for utilities, a utility was obliged to use its bill to communicate to its customers the rates *set by the Commission*. Cal. Const. Art. XII, § 6; Cal. Pub. Util. Code §§ 728 and 729; Comm. M.D. A57-A58.

In *Campbell Telephone Co.*, 27 Cal.R.R.C. 251 (1925), the Commission addressed the problem of the inconvenience to telephone subscribers of receiving two separate telephone bills, one for local exchange service from the Campbell Telephone Co. and one for toll service from the Pacific Telephone and Telegraph Co. The Commission concluded that "a more satisfactory relation would result both to the subscribers and applicant [the local exchange carrier] if the latter would handle the billing for toll service to its subscribers." *Id.* at 252. Thus in 1925 the Commission effectively ruled that the local company communicate through its billing process the "message," or demand for payment, of a third party.[17]

[15] The Commission commonly sets the precise terms of a tariff and orders the utility to file it. Such tariffs have the force of law. *Dyke Water Co. v. Public Utilities Commission*, 56 Cal.2d 105, 123, 14 Cal. Rptr. 310, 363 P.2d 326, *cert. denied*, 368 U.S. 939 (1961).

[16] The requirement was stated as follows, 17 Cal.R.R.C. at 147:

"(b) Bills

"(1) Each bill for electric service will contain on the face the following notation: 'See other side for rules regarding payment of bills, disputed bills and discontinuance of service.'

"(2) Each bill for electric service will contain on the back thereof a copy of Rule and Regulation No. 6(b), No.9(a) and No. 11."

[17] The same principle applies today. The Commission recently ruled that the public interest is served by permitting Pacific Bell, the western regional Bell Operating Company, to include with its own bill the bill of

And in *Packard v. Pacific Tel. & Tel. Co.*, 71 Cal.P.U.C. 469, 480 (1970), and *Welch v. Pacific Tel. & Tel. Co.*, 72 Cal.P.U.C. 74, 75 (1971), the Commission required a utility to include on its bill for services a utility user's tax. The demand for payment of the tax, which was collected by the utility and remitted to the taxing municipality, was in essence the speech of a third party.

On many occasions, the Commission has regulated the billing process to ensure that appropriate rate- and service-related information reaches the customer. Such regulation has ranged from merely altering the format of the bill[18] to specifying the wording of bill inserts concerning a wide variety of subjects.[19]

AT&T Communications and/or other long distance carriers. *Pacific Tel. & Tel. Co.*, __ Cal.P.U.C.2d __ (Dec. No. 85-01-010 Jan. 3, 1985).

[18] For example, the Commission has required changes in the format of a utility bill where it concluded that the customer was entitled to fuller itemization of charges, where additional information appeared necessary to assist telephone subscribers in ascertaining whether to rent or purchase their telephones, and where a change was necessary to ensure that customers protesting a utility user's tax would not have service disconnected while pursuing such protests in the courts. *See, e.g., Pacific Gas & Electric Co. v. Public Utilities Commission,* Cal. Sup. Ct., S.F. No. 24734, Comm. Answ. to Pet. for Rev., 24 n. 19, and cases there cited.

[19] Recent bill inserts ordered by the Commission have notified telephone subscribers of a lifeline program to ensure universal service in the wake of the AT&T divestiture, have indicated that elderly and handicapped customers may designate third parties to receive notices on their behalf to forestall the improper discontinuance of service, have announced the availability of communications devices for the deaf, have detailed in foreign languages emergency telephone numbers and dialing information, have announced the availability of water conservation devices, have provided information concerning a variety of Commission-approved weatherization and energy conservation programs, have explained the effects of certain legislation on utility rates and have explained the components of utility costs, services and rate increases. *See, e.g.*, Comm. Answ., *supra* note 18, at 24-26 n. 20 (citing a Commission Resolution and Rule and some 31 recent decisions requiring utility bill inserts).

Thus the Commission has long exercised regulatory authority over the billing envelope, including the practice of enclosing bill inserts in that envelope.[20]

C. The Commission's Decision Rationally Furthers Important State Interests.

In its decision, the Commission identified the interests sought to be served by the decision as "the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." Comm. M.D. A27. It also indicated that addressing these twin goals—*i.e.*, enhancing the degree of consumer participation in Commission proceedings [21] and expanding the body of regulatory-related information received by consumers[22]—was intended to

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[20] Notably, the use of bill inserts to communicate with utility ratepayers has become so commonplace that even U.S. District Judge Harold H. Greene has exercised the court's equitable powers in the AT&T divestiture case to require the inclusion of an informational bill insert. *See United States v. Western Electric Co.*, 578 F. Supp. 668, 676 (D.D.C. 1983).

The Congress of the United States has used its legislative power to that same end. *See* 16 U.S.C. § 2625(f)(2); 42 U.S.C. § 300g-3(c).

[21] The Commission concluded that without "the opportunity of belonging to an organization which could afford to hire people with the technical expertise to represent their interests in [highly technical Commission] proceedings," Comm. M.D. A20-A21, many individual utility customers might consider their ability to participate in such proceedings "illusory," *id.* at A20. Thus the Commission decided to give ratepayers "an opportunity to be informed of and to support advocacy efforts on their behalf." *Id.* at A21. The decision serves the State's interest in securing the consumers' rights to full and effective participation in Commission proceedings. *See* Cal. Pub. Util. Code § 454.

[22] The Commission's decision was intended to serve the State's interest in furthering the free flow of information to the consumer—the very interest underlying this Court's recognition that utility speech is entitled to constitutional protection, *Consolidated Edison, supra,* 447 U.S. at 533-534; *Central Hudson Gas & Electric Corp., supra,* 447 U.S. at 561-562, and the very interest upon which the State granted public access to private property for expressive purposes in *PruneYard Shop-*

serve the Commission's interest in fulfilling its state constitutional and statutory responsibility to regulate public utilities in the public interest. Under California law, the Commission is dutybound to assure that California public utilities charge rates which are "just and reasonable"; that they provide service which is "adequate, efficient, just and reasonable"; and that they establish rules pertaining to rates and service which are "just and reasonable." *E.g.*, Cal. Pub. Util. Code § 451. The Commission has rationally concluded that enhancing consumer understanding of regulatory-related issues and according ratepayers "an opportunity to be informed of and to support advocacy efforts on their behalf," Comm. M.D. A21, will provide the Commission itself with more complete information from which to make its required regulatory determinations.[23] As noted by the decision, "participa-

ping Center v. Robins, supra, 447 U.S. 74. As stated in the Commission's decision, "[i]t is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." Comm. M.D. A22. Ironically, PG&E is now asserting its interest in "free speech" in order to impede the very constitutional value upon which the Court extended First Amendment protection to utility speech. *Consolidated Edison, supra,* 447 U.S. at 533.

Moreover, giving the customers of a natural monopoly needed information of a type which would normally be provided by an industry controlled by competitive forces is one of the primary justifications for regulation. *See* S. Breyer, *Regulation and Its Reform* 26-28 (1982); P. Joskow & R. Noll, *Regulation in Theory and Practice: An Overview*, in *Studies in Public Regulation* 24-27 (G. Fromm, ed. 1981). Notably, PG&E's practice of enclosing *Progress* in the billing envelope began in the 1920's, *see* PG&E Br. 3, a decade in which, according to one commentator, public utilities seeking to limit public controls on the industry "conducted the 'greatest peacetime propaganda campaign ever conducted by private interests in this country.' " I. Barnes, *The Economics of Public Utility Regulation* 782 (1942). *See generally id.* at 782-815; E. Troxel, *Economics of Public Utilities* 72 (1947).

[23] Respected scholars have noted that the State's legitimate regulatory goals may be subverted by a public utility's manipulation of information. Those scholars suggest that a condition of "information impactedness" between the regulated utility and the regulatory authority—the inability of the regulatory authority to obtain complete information from the utility due to the latter's control of key information sources—may, where

tion by representatives of consumer groups tends to enhance the record in our proceedings," *id.* at A19, and granting consumer groups access to the billing envelope is simply another alternative to "help assure the development of a full and fair record," *id.* at A20. Leaving PG&E with a monopoly on access to the billing envelope forum not only impedes the information and participation interests of consumers but also tends to deprive the Commission of a full record in its proceedings and thus tends to impair the fairness and accuracy of its regulatory determinations.[24]

II

THE COMMISSION'S DECISION PLACES NO COGNIZABLE RESTRICTION ON PROTECTED AFFIRMATIVE SPEECH OR PROTECTED EDITORIAL DISCRETION

A. The Decision Does Not Limit Protected Affirmative Speech.

In *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), the Court extended First Amendment protection to the affirmative speech of a corporation based on the public's interest

opportunistically exploited, lead to the utility's obtaining significant excess profits and even, in some cases, to its "capture" of the regulatory body. B. Mitnick, *The Political Economy of Regulation* 206-214 (1980); R. Schmalensee, *The Control of Natural Monopolies* 47, 59, 102, 126 (1979); S. Breyer, *supra* note 22, at 109-112; P. Quirk, *Industry Influence in Federal Regulatory Agencies* 16-17 (1981).

[24] As was argued to the California Supreme Court, regulation of the extra space is mandated not only by the Commission's authority to regulate the service, practices and property of a public utility but also by its authority to regulate rates. Cal. Pub. Util. Code §§ 728 and 729; Comm. M.D. A57-A58. Since the extra space has economic value measured by its ability to generate income and since the generation of such income would reduce rates, PG&E's exclusive appropriation of the extra space for its own use is equivalent to raising rates without required Commission authorization. Under its authority to regulate rates, the Commission is entitled to regulate the use of a potentially income-generating asset for the ratepayers' benefit. The Commission's decision serves the State's interest in limiting PG&E's "unjust enrichment" flowing from its monopolization of the extra space. Comm. M.D. A3-A4.

in "access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783. In so ruling, the Court noted that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." *Id.* at 777. Similarly, in *Consolidated Edison Co. v. Public Service Commission, supra*, 447 U.S. 530, the Court invalidated an order of the New York Public Service Commission which had banned outright a public utility's use of bill inserts expressing the utility's views on controversial issues of public policy. The Court stated that "Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters." *Id.* at 534 n. 1.[25]

Here, unlike *Bellotti* and *Consolidated Edison,* the State has placed no cognizable restriction on protected affirmative speech. In granting TURN limited access to the extra space in the billing envelope, the Commission's decision specifically states that "PG&E shall be permitted to use the extra space during the remaining eight months and may also make use of any extra space not used by TURN during the months TURN's material is inserted." Comm. M.D. A38. Nothing in the decision prohibits PG&E from disseminating *Progress* in the billing envelope, even in the months in which access is granted to TURN, so long as it pays the additional postage costs, if any.

While the inclusion of TURN's insert might conceivably consume the entire extra space on which postage has been prepaid,[26]

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[25] As the Court recognized in *Consolidated Edison, supra,* 447 U.S. at 534 n. 2, and *Bellotti, supra,* 435 U.S. at 777 and n. 12, affording First Amendment protection to the affirmative speech of a natural person serves "the individual's interest in self-expression." That First Amendment interest is not implicated where the speaker is an artificial entity, such as a corporation or a public utility.

[26] There has been no showing, nor is there any reason to suppose, that the inclusion of TURN's insert would ever necessitate the exclusion of *Progress* from the envelope. The probability that the utility's insert and "other inserts that [the utility] might be ordered lawfully to include in the billing envelope" could peaceably coexist in the envelope was noted

thereby necessitating the utility's incurring additional postage costs for the delivery of *Progress* in the same envelope, that is not a constitutionally cognizable restriction on protected affirmative speech. The requirement that PG&E move *Progress* from the "free" (*i.e.,* postage prepaid) portion of the interior of the envelope to that portion necessitating additional postage costs merely eliminates a subsidy which PG&E has conceded the Commission may properly eliminate. *See* PG&E Br. 39; PG&E Br. in Opp. to Mot. to Dism., text at 3 and 2-3 nn. 2 and 3; PG&E Reply Br., Cal. Sup. Ct., S.F. No. 24734, text at 14 and 15 n. 8. The State's decision "not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation, supra,* 461 U.S. at 545-546, and cases there cited. As the Court stated in *Taxation With Representation,* 461 U.S. at 549-550, *quoting Harris v. McRae,* 448 U.S. 297, 316 (1980), " 'although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own making.' "

The Commission's decision here merely raises the possibility that the "free ride" which PG&E and its shareholders have previously enjoyed at the expense of ratepayers may on occasion be lessened.[27] It can hardly be contended that the First Amendment confers a constitutional right on PG&E to have the delivery of its message subsidized by the ratepayers. The denial of a free ride is not a denial of free speech. *Taxation With Representation, supra,* 461 U.S. at 545-546; *Greenburgh Civic Assns., supra,* 453 U.S. at 127; *Consolidated Edison, supra,* 447 U.S. at 543, text at

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by this Court in *Consolidated Edison, supra,* 447 U.S. at 543. Moreover, should a realistic possibility of exclusion ever arise, the utility need only expand the size of its envelope.

[27] It is unlikely that the Commission's decision would eliminate the subsidy entirely on those occasions because, among other things, the marginal cost of stuffing the envelope space applicable to the second ounce of postage is less than that applicable to the first ounce, *e.g.,* the postage applicable to the second ounce is less than the postage applicable to the first ounce, the entire envelope can be stuffed in a single mechanical motion and the stuffing of the second ounce does not require the purchase of an additional envelope.

n. 12; *see also Abood v. Detroit Board of Education,* 431 U.S. 209, 233-236 (1977); *Consolidated Edison, supra,* 447 U.S. at 544 (Marshall, J., concurring) and 551 (Blackmun, J., dissenting).[28]

Thus, should the Commission's decision ever necessitate the relocation of *Progress* from the subsidized space in the envelope to unsubsidized space in the same envelope, that occurrence would have no constitutional significance. It would merely constitute reasonable economic regulation within the State's acknowledged police power. *E.g., Munn v. Illinois, supra,* 94 U.S. at 125-130; *New Orleans v. Dukes, supra,* 427 U.S. at 303-306; *Sutter Butte Canal Co., supra,* 279 U.S. at 135-138. Accordingly, the Commission's decision does not in any significant way limit PG&E's ability to speak in the billing envelope.

Miami Herald Publishing Co. v. Tornillo, supra, 418 U.S. 241, on which appellant relies, is not to the contrary. There the Court struck down as violative of the First Amendment's free press guarantee a Florida statute which accorded political candidates subjected to newspaper criticism the right to equal space for reply.

Although appellant characterizes *Tornillo* as a case involving "the right to refrain from speaking," PG&E Br. 16, it is best understood either as a case which, like *Bellotti* and *Consolidated Edison,* involved a state-imposed restriction on protected affirmative speech or as a case which involved a restriction on the

[28] Even if an allocation of costs and benefits to eliminate the ratepayers' subsidy of PG&E's speech were possible, as PG&E now contends (but without having presented any proof on the point before the Commission), such an allocation would not serve most of the identified interests underlying the Commission's decision, *i.e.,* the dissemination of fuller information to the consumer, the fuller participation of consumer representatives in Commission proceedings, and the Commission's consequent reception of a fuller record in its proceedings, thereby enhancing the accuracy and fairness of its regulatory determinations. Since these interests would not be served by an allocation eliminating any subsidy, such an allocation would not obviate the Commission's policy granting access. As noted previously, the Commission found the quantification of the economic value of the extra space would be "subjective and imprecise because it is based on many variables." Comm. M.D. A33.

editorial freedom of a newspaper. Neither type of restriction is present here.

The Court found a restriction on protected affirmative speech in *Tornillo* in the "right of reply" statute's exaction of a penalty in terms of cost and space allocation from a newspaper based on its affirmative speech content. *Id.* at 256-257. The Commission's decision here exacts no such penalty. First, it assures that PG&E will recover from TURN "all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials." Comm. M.D. A39. And second, it requires no alteration of the size and content of *Progress.* Under the decision, PG&E is given complete, unreviewable authority to "determine the content of its own material." Comm. M.D. A38.

In addition, the Florida "right of reply" statute in *Tornillo* was found to have a chilling effect on the newspaper's presentation of those topics which might trigger the application of the statute. *Id.* at 257. "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced." *Id.* (footnote omitted).

Here, however, no such chilling effect is present. The Commission's grant of access to TURN is not contingent on PG&E's addressing a particular topic which would trigger a right of reply. Under the Commission's decision, access is granted to TURN no matter what PG&E chooses to say in *Progress.* Hence, the grant of access does not chill PG&E's addressing any topic, and PG&E's chosen message is limited only by "the power of the thought to get itself accepted in the competition of the market. . . ." *Consolidated Edison, supra,* 447 U.S. at 534, *quoting Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). By adding a distinct voice to the billing envelope, the Commission's decision serves the same core value underlying the Court's protection of affirmative speech under the First Amendment in *Bellotti, Consolidated Edison,* and *Tornillo — i.e.,* the encouragement of wide-open debate on issues of public importance. Hence, the decision neither " 'dampens the vigor [nor]

limits the variety of public debate.' " *Tornillo, supra,* 418 U.S. at 257, *quoting New York Times Co. v. Sullivan,* 376 U.S. 254, 279 (1964).

B. The Decision Does Not Limit Protected Editorial Discretion

Tornillo may also be characterized as a case involving a restriction on the editorial freedom of a newspaper because there the Court concluded that irrespective of any penalties and chilling effect on the newspaper's speech, the Florida statute constituted an impermissible "intrusion into the function of the editors." 418 U.S. at 258.

Such an intrusion is not involved here because the Commission's decision does not grant access to *Progress* itself; it merely grants access to the billing envelope—the means of delivery by which *Progress,* the bill, the return envelope, and such other separate inserts as are required by statute or by the Commission are carried to the utility customer. Under the Commission's decision, the editors of *Progress* retain complete freedom to address any viewpoint or subject matter, or none at all, within the four corners of their own publication. *See* Comm. M.D. A38. And the grant of access engenders no more interference with the content of *Progress* than it does with the content of the other enclosed notices or the content of the bill. The Commission's order in no way disturbs PG&E's exercise of "editorial judgment" as defined in *Tornillo*—the "choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials." 418 U.S. at 258.

Tornillo itself strongly supports this view. While the decision repudiates the constitutional validity of state laws which compel the editors or publishers of a newspaper to print that which "'"reason" tells them should not be published,'" *id.* at 254, *quoting Associated Press v. United States,* 326 U.S. 1, 20 n. 18 (1945), it stresses that the publishers of one newspaper may not use their First Amendment freedoms to impede the free speech of others. 418 U.S. at 251-254. Noting that newspapers are not

immune from the antitrust laws, *Tornillo* quotes at length from *Associated Press, supra,* 326 U.S. at 20, as follows:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

418 U.S. at 252.[29]

Mindful of the distinction, PG&E argues that the Commission's decision interferes with its editorial discretion "to select the content of its *billing envelopes.*" PG&E Br. 11 (emphasis added). But that claim is unpersuasive in light of the State's traditional regulation of the billing envelope in the public interest, including its longstanding, never-challenged practice of requiring PG&E to

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[29] Similarly, privately-owned public utilities are exempt from federal antitrust laws only to the extent their anticompetitive conduct is taken pursuant to a clearly articulated state policy and is actively supervised by the State. *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. ____, 85 L.Ed.2d 36, 105 S.Ct. 1721 (Mar. 27, 1985), citing *Parker v. Brown,* 317 U.S. 341 (1943), and *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980). "Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Town of Hallie v. City of Eau Claire,* 471 U.S. ____, 85, L.Ed.2d 24, 34, 105 S.Ct. 1713, 1720 (Mar. 27, 1985).

include Commission-ordered messages in the envelope alongside *Progress*. Under *Tornillo*, the First Amendment may render the content of *Progress* itself immune from reasonable state regulation, but it cannot render the entire envelope immune; the envelope and the space inside it are by longstanding practice a regulated instrumentality of a heavily regulated commercial enterprise. Indeed, the Court indicated as much in *Consolidated Edison* when it stated that "the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope . . . will not result in a 'cacophony of competing voices.' " 447 U.S. at 543, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969).

If, as this Court has stated, "[*Tornillo*] rests on the principle that the State cannot tell a newspaper what it must print," *PruneYard Shopping Center v. Robins, supra*, 447 U.S. at 88, that principle is not violated by the Commission's decision here. The orderly addition of separate and distinct voices to the envelope does not interfere with the utility's articulation of its chosen message.

C. Even Assuming Arguendo that the Court Perceives an Infringement on Affirmative Speech, the Commission's Decision Satisfies the Standards for the Permissible Content-Neutral Regulation of Affirmative Speech

As indicated above, this is not a case involving a restriction on affirmative speech. Indeed, PG&E has largely abandoned that claim in its brief on the merits. Nevertheless, should the Court perceive a restriction on affirmative speech, the Commission's decision satisfies the standards for the permissible content-neutral regulation of affirmative speech.

1. The Decision is Facially Content-Neutral

The Commission's decision is content-neutral on its face. The decision states: "Currently, no controls are placed on the content of *Progress* and we will not undertake to control the material inserted by TURN." Comm. M.D. A22. And it further orders that "PG&E . . . shall . . . determine the content of its own material." And, as shown above, the decision places no cognizable

limitation on PG&E's ability to address any subject matter or to express any viewpoint. *Consolidated Edison, supra*, 447 U.S. at 536. Thus, unlike in *Consolidated Edison*, the Commission has not in any significant way "limited the means by which [the utility] may participate in the public debate on . . . controversial issues of national interest and importance." *Id.* at 535. The Commission's regulation is plainly content-neutral.

PG&E nevertheless argues that by granting access to TURN, the Commission's decision impermissibly evaluates the content of speech and expresses a preference for the views of TURN over those of PG&E. PG&E Br. 22-24. The argument is unfounded. Under the Commission's decision, PG&E may use the extra space for its communicative purposes at least eight and possibly all twelve months of the year, and the utility retains the ability to enclose *Progress* in the billing envelope (whether or not in the extra space) each and every month of the year. TURN, on the other hand is granted access to the extra space but four times per year. It is difficult to comprehend how this allocation of access demonstrates a Commission preference for TURN's views over those of PG&E.

Moreover, the Commission's decision does not concern itself with the content of the respective messages of PG&E and TURN. It leaves that determination in the hands of the speakers. Comm. M.D. A22, A38. Seeking only to accord the billing envelope's audience of ratepayers "exposure to a variety of views, [not just] that of PG&E," *id.* at A22, it attempts to foster diversity in order to serve the State's interests in public information and debate, consumer participation in Commission proceedings, and, ultimately, the fairness and accuracy of its own regulatory determinations. And it does so explicitly seeking to preserve "the ongoing availability of PG&E's views."

The decision constitutes an "effort, not to abridge, restrict, or censor speech, but rather to facilitate and enlarge public discussion in the [regulatory] process, goals vital to a self-governing people. Thus, [it] furthers, not abridges, First Amendment values." *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) *(per curiam)* (footnotes omitted).

2. PG&E's Claim of Inevitable Content-Based Discrimination is Not Before the Court

PG&E also argues that the Commission's decision will inevitably lead it to license speakers based on their viewpoints:

> To carry out the commission's edict, government will be required not only to pick and choose from the multitude of competing groups, but also to resolve the numerous disputes that will inevitably arise because of what the various groups, both political and nonpolitical, will wish to say. Thus, government will license speakers to use the envelope based solely upon what they intend to say.

PG&E Br. 25 (footnote omitted).

The argument is without merit, as will be shown below, but the Court should decline to reach it for two reasons. First, the claim is premature. The Commission's decision does not refuse billing envelope access to anyone, and there is no certainty it will ever do so. *Babbitt v. Farm Workers,* 442 U.S. 289, 303-304 (1979). And second, PG&E, contending that everyone *but it* should be denied envelope access, has no standing to raise the claims of third parties who are its adversaries. *Phillips Petroleum Co. v. Shutts,* ____ U.S. ____, 53 U.S.L.W. 4879, 4881 (June 26, 1985); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. ____, 81 L.Ed.2d 580, 590 n. 6, 104 S.Ct. 2694, 2701 n. 6 (June 18, 1984) ("[R]espondent plainly lacks standing to raise a claim concerning his adversaries' constitutional rights in a case in which those adversaries have never advanced such a claim."); *Harris v. McRae, supra,* 448 U.S. at 320.

3. PG&E's Claim of Inevitable Content-Based Discrimination is Without Merit

Assuming *arguendo,* however, that the Court reaches the merits of this highly speculative claim of inevitable content-based discrimination, the claim should be rejected. The Commission's decision, for substantial and legitimate reasons, establishes a

program of fair access to the billing envelope extra space.[30] In granting access to TURN, the decision denies access to no one, and acknowledges the Commission's receptiveness to the proposals of other applicants.

> [W]e are not foreclosing the adoption of similar proposals in the future. Indeed, a checkoff mechanism whereby ratepayers can select among a number of qualified consumer organizations may be both necessary and desirable in situations where more than one organization has sought access to the envelope. We agree with TURN that an essential element of such a mechanism is the development of neutral criteria to determine eligibility.

Comm. M.D. A21-A22; *see also id.* at A11, A24.

Because of the limited nature of the billing envelope forum and the purpose the forum has traditionally served, the Commission may (or may not) be required in another case to make distinctions in access based on speaker identity. But such distinctions have often been upheld by this Court where they were reasonable and not intended to suppress disfavored views.

Thus, in *Regan v. Taxation With Representation, supra,* 461 U.S. at 551, the Court rejected an equal protection challenge to a statutory classification which subsidized the speech of veterans' organizations but not other organizations without applying strict scrutiny. Observing that it found "no indication that the statute was intended to suppress any ideas or any demonstration that it had that effect," *id.* at 548, the Court approved the classification

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[30] With variations, a "fairness" approach to billing envelope access has been endorsed by legal commentators. *See generally* Harrison, *Public Utilities in the Marketplace of Ideas: A 'Fairness' Solution For a Competitive Imbalance,* 1982 Wis. L. Rev. 43 (1982); Comment, *Public Utility Bill Inserts, Political Speech, and the First Amendment: A Constitutionally Mandated Right to Reply,* 70 Calif. L. Rev. 1221 (1982); Comment, *Access to Public Utility Communications: Limits Under the Fifth and First Amendments,* 21 San Diego L. Rev. 391 (1984); Note, *Utility Companies and the First Amendment: Regulating the Use of Political Inserts in Utility Bills,* 64 Va. L. Rev. 921, 931-932 (1978).

because it bore "a rational relation to a legitimate governmental purpose," *id.* at 547.

Similarly, in the context of a nonpublic forum on property owned or controlled by the government, this Court has concluded that the State may "make distinctions in access on the basis of subject matter and speaker identity." *Perry Education Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at 49. "These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.* (footnote omitted). Thus in *Perry* this Court upheld a school policy permitting access to teachers' mailboxes for a union elected by teachers as their exclusive bargaining representative but denying access to a rival union because the policy distinguished between the two unions based on their *status* rather than their views. *Id.*

Moreover, reading the majority opinion in *Perry, id.* at 53, alongside Justice Brennan's dissent, in which three other Justices joined, *id.* at 61 n. 5, 64 n. 8, the Court seems unanimous in the view that distinctions based on speaker identity in a nonpublic forum are permissible where access is restricted to those involved in the "official business" of the particular governmental agency involved. The common thread running between PG&E and TURN, the two organizations granted access by the Commission's decision, is that they are participants in Commission proceedings.[31]

Finally, in another nonpublic forum case, *Cornelius v. NAACP Legal Defense Fund,* ___ U.S. ___, 53 U.S.L.W. 5116, 5121 (July 2, 1985), the Court stated that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of

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[31] *See also Consolidated Edison, supra,* 447 U.S. at 545-546 (Stevens, J., concurring) (noting that there are numerous distinctions based on subject matter and speaker identity in the rules and practices of this Court).

the purpose served by the forum and are viewpoint neutral." *See also U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. at 132-133 (upholding a content-neutral regulation prohibiting placement of mailable matter not bearing postage in privately-owned mailbox).

In sum, in several contexts, this Court has approved enactments which made distinctions in access which were based on speaker identity but retained their viewpoint-neutral character. The Commission here has demonstrated a sensitivity to the need for developing "neutral criteria to determine eligibility," Comm. M.D. A22, and has committed itself to that end, should the problem arise. Under these circumstances, there is no reason to suppose that the Commission will be unable to administer its fair access program in a constitutionally permissible fashion.

4. The Decision Withstands "Time, Place, and Manner" Analysis.

To the extent the Court perceives the Commission's decision as imposing a restriction on PG&E's affirmative speech, it is sustainable as a "reasonable time, place, and manner" regulation which is content-neutral, serves a significant governmental interest, and leaves open ample alternative channels for communication. *Consolidated Edison, supra,* 447 U.S. at 535.[32] Since the decision does not restrict PG&E's speech based on content, the remaining questions are whether it serves a significant governmental interest and leaves open ample alternative channels for communication. It does both.

First, as noted previously, the Commission's granting TURN access to the extra space in the billing envelope is narrowly tailored[33] to serve several significant governmental interests. It

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[32] In *Clark v. Community for Creative Nonviolence,* 468 U.S. ___, 82 L.Ed.2d 221, 230 and n. 8, 104 S.Ct. 3065, 3071 and n. 8 (June 29, 1984), the Court indicated that a regulation which satisfies the "time, place, and manner" standard also satisfies the test of *United States v. O'Brien, supra,* 391 U.S. at 376-377.

[33] It is difficult to see how the grant of access could be more narrowly tailored. The Commission has taken great pains to leave PG&E's prior

promotes full and effective consumer participation in CPUC proceedings. App. A27, A35, A36. It enhances the accuracy of the fact-finding process by "tend[ing] to enhance the record in [such] proceedings." App. A36. It provides information about consumer organizations to those ratepayers desiring such information and furthers the fuller understanding of energy- and regulatory-related issues by consumers. App. A20-A21, A27, A36. It advances the ratepayers' state and federal constitutional rights to receive ideas and information, based on the assumption "that the ratepayers will benefit more from exposure to a variety of views than they will from only [those] of PG&E." Comm. M.D. A22. It provides added protection for the particular interests of residential ratepayers and other specific ratepayer groups beyond that provided by the Commission's staff (which is charged with representing *all* ratepayers). Comm. M.D. A20. And, by enhancing the record and body of information before the Commission in rate proceedings, it promotes "just and reasonable" rates and service, the overall objective of the regulatory

practice untouched by its regulation. And intervenor funding programs, posited by PG&E as a less restrictive alternative, do not serve the consumer informational interest identified in the decision nor, in the Commission's judgment, do they sufficiently serve the other identified interests. Comm. M.D. A7. The degree to which these interests should be served is a matter for the State. *Clark v. Community for Creative Nonviolence, supra,* 468 U.S. at ____, 82 L.Ed.2d at 231, 104 S.Ct. 3072; *cf. Zauderer, supra,* 471 U.S. at ____ n. 14, 85 L.Ed.2d at 673 n. 14, 105 S.Ct. at ____ n. 14. In addition, putting the space to affirmative use for the benefit of ratepayers was required to serve the State's interests in efficiency and avoiding waste.

Finally, since the *O'Brien* test is functionally equivalent to the "time, place, and manner" test, any "tailoring" requirement of the latter test must be read in light of *United States v. Albertini,* ____ U.S. ____, 53 U.S.L.W. 4844, 4848 (June 24, 1985), in which the Court noted that "an incidental burden on speech is no greater than essential, and therefore is permissible under *O'Brien,* so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

scheme.[34] All of these are legitimate and significant government interests. *See Pacific Gas & Elec. Co. v. Energy Resource Commission, supra,* 461 U.S. at 205; *Central Hudson Gas & Electric Corp., supra,* 447 U.S. at 561-562, 568-569; *Consumers Lobby Against Monopolies, supra,* 25 Cal.3d at 911.

And second, the Commission's decision leaves PG&E with unlimited "alternative channels of communication." 447 U.S. at 535. Every day of the year, if it so desires, PG&E may send as many copies as it pleases of *Progress* or any other publication to its customers, so long as it pays the requisite postage and other costs. Indeed, on the very day that TURN's insert is enclosed in the billing envelope, PG&E may send unlimited materials in rebuttal either in the billing envelope or under separate cover. In sum, PG&E, as sole owner of its customer list, has an unlimited direct mail forum to its customers so long as it underwrites the cost of delivery. This constitutes "ample alternative channels for communication."

However, organizations such as TURN have no comparable channel of communication. While they may advertise in the media in ways generally available to the public, they do not have PG&E's customer list and hence have no way of reaching *precisely* that audience of 4.2 million ratepaying bill recipients.[35] Nor

[34] The decision also serves the State's related interest in limiting PG&E's unjust enrichment by reason of its monopolization of and refusal to share the extra space. Comm. M.D. A3-A4.

[35] It is doubtful whether PG&E can properly disclose, or be ordered to disclose, to private groups the names and addresses of its customers. Cal. Const. art. I, § 1, explicitly guarantees the right of privacy to all California citizens, and only recently, in *People v. Chapman,* 36 Cal.3d 98, 113, 201 Cal.Rptr. 628, 679 P.2d 62 (1984), the California Supreme Court held that a utility customer had a reasonable expectation of privacy in unlisted information concerning his name and address, and that the warrantless disclosure of this information violated the search and seizure provisions of Cal. Const. art. I, § 13. Accordingly, the Commission's decision here appears to be the only reasonable way of granting other voices access to the direct mail forum while accommodating the state constitutional privacy rights of the ratepayers. The State, of course, has a significant, if not compelling, interest, *see Widmar v.*

do such organizations have a way of reaching that "captive" audience in a manner which demands its special attention to their message. *See* Comm. M.D. A4 n. 2.

By granting TURN access to the extra space in the billing envelope four times a year, the Commission has adopted a reasonable time, place, and manner regulation narrowly tailored to serve a significant governmental interest and leaving PG&E ample alternative channels for communication. *E.g., Perry Education Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at 45; *U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. at 132; *Consolidated Edison, supra,* 447 U.S. at 535-536.

5. The Decision Constitutes Permissible Regulation of a Nonpublic Forum.

However, the traditional "time, place, and manner" test, though plainly satisfied by the Commission's decision, may actually be more stringent than the test applicable here because the space in the billing envelope is not, nor has the Commission ever treated it as, an unlimited "public forum." The billing space is a nonpublic forum over which the Commission, by its broad regulatory powers, has "the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry, supra,* 460 U.S. at 49. "The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.* (footnote omitted).

In *U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. 114, the Court considered the constitutionality of a federal statute which provided that a citizen's privately-owned mail receptacle regulated by the U.S. Postal Service not be used for the delivery of mailable matter on which postage had not been paid. Noting that no person is required to provide a mailbox, the Court observed that "[w]hat the legislation and regulations do require is that those persons who *do* wish to receive and deposit their mail at their home or business do so under the direction and control of the Postal Service." *Id.* at 126 (emphasis in original).

Vincent, 454 U.S. 263, 275-276 and n. 17 (1981), in complying with its own constitution.

Eschewing the "time, place, and manner" analysis applied to traditional public forums," *id.* at 132, the Court concluded that the governmentally-imposed postage requirement for the use of privately-owned mailboxes was permissible simply because it was "both reasonable and content-neutral." *Id.* at 131 n.7 and 133.[36]

The billing envelope forum here, like the mailbox forum in *Greenburgh,* is a nonpublic forum on property owned or controlled by the government. The history and scope of the Commission's regulation of the billing envelope make plain that, irrespective of its ownership, the envelope is property subject to the State's broad regulatory control, and the Commission's decision strongly suggests that its intent was to create a nonpublic forum. *Compare Cornelius v. NAACP Legal Defense Fund, supra,* 53 U.S.L.W. at 5120-5121. Accordingly, any perceived restriction on PG&E's affirmative speech is permissible so long as it is reasonable and not an attempt to suppress PG&E's viewpoint because the Commission disagrees with its views. *Id.* at 5121; *Perry, supra,* 460 U.S. at 49. The decision is therefore sustainable as permissible regulation of a nonpublic forum.[37]

[36] "Public property which is not by tradition or designation a forum for public communication may be reserved by the state 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'" *City Council v. Taxpayers for Vincent,* ____U.S. ____, 80 L.Ed.2d 772, 793, 104 S.Ct. 2118, 2134 (May 15, 1984), *quoting Perry, supra,* 460 U.S. at 46.

[37] Moreover, if the Court were to perceive a content-based restriction on PG&E's affirmative speech, the state interests asserted are sufficiently important to justify the regulation. The Commission's decision, carefully crafted to ensure PG&E's unfettered voice in the envelope and to ensure that TURN's voice will not be misidentified as that of PG&E, is obviously not intended to have, nor does it have, an effect of suppressing PG&E's speech because the State disagrees with its views.

III

THE COMMISSION'S DECISION PLACES NO COGNIZABLE RESTRICTION ON PROTECTED RIGHTS TO REFRAIN FROM SPEAKING OR TO REFRAIN FROM ASSOCIATING WITH THE VIEWS OF ANOTHER

A. The Interest Underlying the Court's Recognition of Negative Speech and Associational Rights Is Not Strongly Implicated Where the Speaker is a Corporation or a Regulated Public Utility

In *Bellotti, supra,* 435 U.S. at 783, in which the Court extended First Amendment protection to the affirmative speech of a corporation, the Court was careful to note that it was not reaching the question "whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons." *Id.* at 776. Indeed, the Court specifically reserved the question "whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities." *Id.* at 777-778 n. 13. And the Court further noted that "[w]hether or not a particular [constitutional] guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Id.* at 779 n. 14.

The interest underlying the First Amendment rights to refrain from speaking and to refrain from associating with the views of another (*i.e.,* negative speech and associational rights) is very different from the broad societal interest identified in *Bellotti, Consolidated Edison,* and *Tornillo* as the basis for affording constitutional protection to the affirmative speech of a corporation. That interest is the individual's interest in the privacy, sanctity and integrity of his personal thoughts and beliefs—"the notion that *an individual* should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood v. Detroit Board of Education, supra,* 431 U.S. 235 (emphasis added).

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia Board of Education v. Barnette, supra, 319 U.S. at 642.

This Court has described this interest variously as "the right of freedom of thought," *Wooley v. Maynard, supra,* 430 U.S. at 714; "individual freedom of mind," *id., quoting Barnette, supra,* 319 U.S. at 637; "freedom to be intellectually or spiritually diverse," *id.* at 641; "individual belief and association," *Elrod v. Burns,* 427 U.S. 347, 371 (1976); and, most recently, in *Wallace v. Jaffree,* ____ U.S. ____, 53 U.S.L.W. 4665, 4668 (June 4, 1985), as "the individual's freedom of conscience"—"the central liberty that unifies the various clauses in the First Amendment." *See id.* at 4668 n. 35.

However this important First Amendment interest is described,[38] it plainly concerns the minds and spirits of natural persons and, as a consequence, is not strongly implicated where the party asserting it is a mere artificial entity such as a corporation or a regulated public utility.

The cases upon which PG&E relies support this view.[39] In *Barnette, supra,* the Court invalidated a state statute which

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[38] As Justice Brandeis wrote in his oft-quoted dissent in *Olmstead v. United States,* 227 U.S. 438, 478 (1928):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

[39] As discussed more fully above, *Miami Herald Publishing Co. v. Tornillo, supra,* 418 U.S. 241, is different from the other cases on which

compelled individual public school students daily to engage in public ceremonies honoring the flag both by reciting a pledge of allegiance and by traditional salutes. The Court concluded that the statute invaded "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. at 642.

In *Wooley v. Maynard, supra,* the Court concluded that a State may not constitutionally "force[ ] *an individual,* as part of his daily life," 430 U.S. at 715 (emphasis added), to disseminate the State's ideological message by displaying it on his automobile license plate.

And in *Abood, supra,* 431 U.S. at 235, the Court held that the State may not require *an individual* to contribute to the support of an ideological cause he may oppose as a condition of his public employment.[40]

The argument is bolstered by the fact that the two constitutional liberties most closely analogous to the right to refrain from speaking—the right to remain silent embodied in the Fifth Amendment privilege against compulsory self-incrimination and the constitutional right to privacy—have been denied to corporations based on their corporate status. *See generally Bellotti, supra,* 435 U.S. at 779 n. 14, and cases there cited.

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appellant relies in asserting its claimed negative speech rights because *Tornillo,* unlike this case, involved a statute which impeded the free flow of information to the public by interfering with the editorial judgment of the publishers of a newspaper.

[40] PG&E's negative associational claim based on *Abood* implicates the same aura of individual autonomy as does its negative speech claim. As the Court noted in *Roberts v. United States Jaycees,* 468 U.S. ____, 82 L.Ed.2d 462, 472-473, 104 S.Ct. 3244, 3250-3251 (July 3, 1984): "As a general matter, only relationships with these [personal] sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection."

In sum, the sole interest underlying the recognition of First Amendment negative speech and associational rights is a "purely personal" interest—"individual freedom of mind." That interest is not strongly implicated where the party asserting it is an artificial entity such as a corporation. Moreover, since the sole interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas—an interest not served by silence—there is no reason to conclude that the First Amendment protects a corporation from being compelled to speak where such a requirement rationally serves the State's legitimate ends. *E.g., Zauderer v. Office of Disciplinary Counsel, supra,* 471 U.S. at ____, 85 L.Ed.2d at 672-673, 105 S.Ct. at ____.[41]

Moreover, if the First Amendment interest in "individual freedom of mind" is not strongly implicated by the State's compelling a corporation to speak, it is even less strongly implicated where the speaker is a regulated public utility. Under California law, any claimed sphere of corporate autonomy is largely surrendered to the extensive regulatory interests of the State at the time the utility is granted monopoly status. *General Telephone, supra,* 34 Cal.3d at 824-828.[42] As the California Supreme Court noted in *General Telephone, supra,* 34 Cal.3d at 826 n. 11, *quoting Gay Law Students Assn. v. Pacific Tel. & Tel. Co.,* 24 Cal.3d 458, 469-470, 156 Cal.Rptr. 14, 595 P.2d 592

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[41] Notably, in *PruneYard Shopping Center v. Robins, supra,* 447 U.S. at 85-88, the Court swiftly rejected the claim of the private owner of a shopping center that the state's granting members of the public access to his private property for expressive purposes violated his First Amendment right to refrain from speaking, distinguishing *Wooley* and *Barnette.*The argument had far more force in *PruneYard,* where the property owner was an individual person, than it does here, where the "owner" of the billing envelope is the largest privately-owned gas and electric public utility in the United States.

[42] PG&E nowhere explains why its asserted sphere of corporate autonomy, if such a realm exists, is not violated by the State's longstanding, never-challenged practice of requiring it to enclose in its billing envelope state-ordered messages which the State deems to be in the public interest.

(1979), the California regulatory scheme leaves little in the way of private corporate autonomy to its regulated public utilities:

> Enroute to our conclusion in *Gay Law Students,* we also noted: "[T]he nature of the California regulatory scheme demonstrates that the state generally expects a public utility to conduct its affairs more like a governmental entity than like a private corporation. Both the prices which a utility charges for its products or services and the standards which govern its facilities and services are established by the state (Pub. Util. Code, §§ 728, 761); in addition, the state determines the system and form of the accounts and records which a public utility maintains and it exercises special scrutiny over a utility's issuance of stocks and bonds. (*Id.,* §§ 792, 816.) Finally, the state had endowed many public utilities, like PT&T, with considerable powers generally enjoyed only by governmental entities, most notably the power of eminent domain. (*Id.,* §§ 610-624.) *Under these circumstances, we believe that the state cannot avoid responsibility for a utility's systematic business practices and that a public utility may not properly claim prerogatives of 'private autonomy' that may possibly attach to a purely private business enterprise."*

(Emphasis in original.)

Accordingly, under the circumstances of this case, PG&E has no cognizable negative speech and associational rights protected under the First Amendment.

B. Even if PG&E May Assert Negative Speech and Associational Rights, Such Rights are Not Violated Here

Even assuming that a public utility possesses some sphere of corporate autonomy upon which a state-ordered compulsion to speak might impermissibly intrude, no such intrusion is involved here.

In *PruneYard Shopping Center v. Robins, supra,* 447 U.S. 74, the private owner of a shopping center sought to exclude persons distributing pamphlets from his property, contending that he had "a First Amendment right not to be forced by the State to use his

property as a forum for the speech of others." 447 U.S. at 85 (footnote omitted). This Court rejected the claim, concluding that a State may exercise its police power to adopt reasonable restrictions on private property without violating the First Amendment so long as the views of those distributing pamphlets were not likely to be identified with the views of the owner, the State had dictated no particular message to be distributed, and the owner was free to disassociate himself from the views of the speakers. *Id.* at 85-88. The Court in *PruneYard* swiftly distinguished *Wooley* and *Barnette,* 447 U.S. at 87, and it may do so here for the same reasons.[43]

None of the four characteristics which *PruneYard* ascribed to *Wooley* is present here. First, this is not a case in which "the government itself prescribed the message." Here the State has refused any entanglement whatsoever in the content of TURN's message ("PG&E and TURN shall each determine the content of its own material") and has taken affirmative steps to ensure that the message will not be interpreted as one prescribed by the State ("All of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by . . . this Commission").

Second, the property involved here is not personal property used as part of an individual owner's daily life, as was the automobile in *Wooley.* It is the heavily regulated monthly billing envelope of the largest privately-owned gas and electric public utility in the country, a traditional forum for state-ordered speech and an important instrumentality of the regulatory process. Indeed, any intrusion on personal autonomy here is far less than in *PruneYard* itself, where the owner of the shopping center was a natural person and the property was not the central communications medium of a heavily regulated industry.

Third, the State has not barred PG&E from disassociating itself from the message. The utility is of course free to "expressly

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[43] Notably, this Court recently cited *PruneYard* for the proposition that "[a] State enjoys broad authority to create rights of public access on behalf of its citizens." *Roberts v. United States Jaycees, supra,* 468 U.S. at ____, 82 L.Ed.2d at 476, 104 S.Ct. at 3254.

disavow any connection with the message," as was the shopping center owner in *PruneYard*, 447 U.S. at 87, but here, unlike the owner in *PruneYard*, PG&E need not do so because here the State has expressly required TURN, as a condition of its access, to inform the public that its message has been "neither reviewed nor endorsed by PG&E." *See also FCC v. League of Women Voters*, 468 U.S. ____, 82 L.Ed.2d 278, 301, 104 S.Ct. 3106, 3125-3126 (July 2, 1984) (acknowledging the effectiveness of disclaimers which identify the speaker).

And fourth, the State's asserted interests justifying the intrusion here are indeed important while in *Wooley* there was "no important state interest." 447 U.S. at 87.[44]

Barnette is distinguishable for much the same reasons. That case "involved the compelled recitation of a message containing an affirmation of belief." 447 U.S. at 88. Such was not the case in *PruneYard*, *id.*, nor is it here.[45]

Moreover, this case, for several additional reasons, presents a less severe intrusion on negative speech rights than *PruneYard*, in which this Court rejected the negative speech claim. First, any "intrusion" here is merely "occasional"—four times per year—rather than daily, as in *PruneYard*. Second, the property in *PruneYard* was privately owned, while here the extra space in the billing envelope is "ratepayer property"[46] as well as property traditionally subject to extensive governmental control. Third, the intrusion here is narrower in scope than that in *PruneYard;* rather than creating a public forum, the Commission here has merely created a nonpublic forum consistent with its regulatory mission and the purposes that the billing envelope has traditionally served.

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[44] *See also League of Women Voters, supra*, 468 U.S. at ____, n. 16, 82 L.Ed.2d at 295 n. 16, 104 S.Ct. at 3120 n. 16 (distinguishing *Wooley*).

[45] *PruneYard* also distinguished *Tornillo* as a case involving a restriction on affirmative speech or as one involving a restriction on the editorial freedom of a newspaper. 447 U.S. at 88. The Court said: "These concerns obviously are not present here." *Id.*

[46] *See* note 12, *supra*.

And fourth, the decision here promotes not only the free speech interests which were the justification for the intrusion in *PruneYard*, but also the consumer participation and regulatory interests articulated in the Commission's decision. *PruneYard*, then, presented a harder case than this one.[47]

Another helpful analogy is provided by *Zauderer v. Office of Disciplinary Counsel, supra*, 471 U.S. ____, 85 L.Ed.2d 652, 105 S.Ct. ____. In *Zauderer*, this Court concluded in the context of commercial speech (*i.e.*, lawyer advertising) that a state-ordered disclosure requirement is constitutionally permissible so long as it is "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 673 (footnote omitted). In so ruling, the Court said:

> Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. . . . Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. We have, to be sure, held that in some instances, compulsion to speak may be as violative of the First Amendment as prohibitions on speech. See, e.g., Wooley v Maynard, 430 US 705, 51 L Ed 2d 752, 97 S Ct 1428 (1977); Miami Herald Publishing Co. v. Tornillo, 418 US 241, 41 L Ed 2d 730, 94 S Ct 2831 (1974). Indeed, in West Virginia State Bd. of Ed. v Barnette, 319 US 624, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674 (1943), the Court went so far as to state that "involun-

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[47] PG&E's negative associational claim based on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), is similarly without merit. *Abood* held that an individual may not be required "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235. But here the Commission's decision provides that "[c]osts of inserting materials in the extra space shall be borne by the sponsor of the materials [and] PG&E shall bill TURN for all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials." Comm. M.D. A38-A39. Moreover, the postage costs attributable to the extra space are paid by the ratepayers, not PG&E.

tary affirmation could be commanded only on even more immediate and urgent grounds than silence." Id., at 633, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674.

But the interests at stake in this case are not of the same order as those discussed in Wooley, Tornillo, and Barnette. Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Id., at 642, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674. The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, see Virginia Pharmacy Board v Virginia Citizens Consumer Council, Inc., 425 US 748, 48 L Ed 2d 346, 96 S Ct 1817 (1976), appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." In re R. M. J., 455 US, at 201, 71 L Ed 2d 64, 102 S Ct 929. Accord, Central Hudson Gas & Electric, 447 US, at 565, 65 L Ed 2d 341, 100 S Ct 2343; Bates v State Bar of Arizona, 433 US, at 384, 53 L Ed 2d 810, 97 S Ct 2691, 5! Ohio Misc 1, 5 Ohio Ops 3d 60; Virginia Pharmacy Bd., supra, at 772, n 24, 48 L Ed 2d 346, 96 S Ct 1817.

Id. at 672 (emphasis in original).

Zauderer provides a close analogy to the present case, for here the State has reasonably concluded that presentation of more than one voice in the billing envelope will serve the informational

needs of the public and, ultimately, those of the Commission itself. Since the extension of First Amendment protection to corporate speech is justified principally by society's interest in discussion, debate, information and ideas, *Bellotti, supra,* 435 U.S. at 783, a public utility's interest in *not* permitting the presentation of other distinct views in the billing envelope, clearly identified as those of the speaker, is minimal. The State need not judge PG&E's speech or characterize it as "deceptive" or "misleading" to rationally conclude that opening the medium to more voices and, inevitably, greater diversity will serve society's interest in robust, uninhibited debate in the marketplace of ideas. *See* note 22, *supra.*

Moreover, in many ways disclosure requirements are more intrusive on negative speech interests than the limited fair access program established here. First, disclosure requirements, unlike the grant of access here, normally alter the content of the speaker's affirmative speech. Second, since the disclosure is contained in the body of the affirmative speech, unlike TURN's message here, it may often be perceived as the speech of the speaker. Third, the disclosure normally contains specific language prescribed or dictated by the State. And fourth, as noted in *Zauderer, id.* at 673, "unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech," while here, as shown above, there is no chilling effect on PG&E's protected speech because the decision grants access to TURN no matter what PG&E says in *Progress.*[48]

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[48] An additional analogy is provided by cases involving the broadcast spectrum. *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. 367; *CBS, Inc. v. FCC,* 453 U.S. 367 (1981); *see also FCC v. League of Women Voters, supra,* 468 U.S. at ____, 82 L.Ed.2d at 301-303, 104 S.Ct. at 3126-3127. While *Consolidated Edison* distinguished *Red Lion* because it involved the regulation of a scarce, publicly owned resource, 447 U.S. at 543, the Court's equating the utility billing envelope to the medium of private correspondence sent through the mails is less supportable on this record, in which the Commission has found the billing envelope to be a *more effective* means of communicating with ratepayers because it is the *billing* envelope. *E.g.,* Comm. M.D. A7, A4 n. 2. Moreover, the Court's distinction of the billing envelope from the broadcast spectrum in

The Commission's decision does not violate any cognizable negative speech or associational rights of PG&E.

C. Even Assuming Arguendo that the Court Perceives an Infringement on Protected Negative Speech and Associational Rights, the Asserted State Interests are Sufficiently Important to Justify the Infringement

In *Wooley v. Maynard, supra,* 431 U.S. at 716, the Court applied the test of *United States v. O'Brien, supra,* 391 U.S. at 376-377, in assessing whether the State's interest in infringing upon negative speech rights was sufficiently important to justify the intrusion.

Under the *O'Brien* test, "[a]pplication of a facially neutral regulation that incidentally burdens speech satisfies the First Amendment if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the

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Consolidated Edison rested in large part on the capacity of the envelope to accommodate "other inserts that [the utility] might be ordered lawfully to include in the billing envelope." 447 U.S. at 543.

As noted in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 389 (1969):

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a . . . frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . .

And in *CBS, Inc. v. FCC, supra,* this Court upheld, as against a First Amendment challenge by a broadcast network, a federal statute creating a limited right of reasonable access to the broadcast media for candidates for federal office. In so ruling, the Court quoted from *Red Lion, supra,* 395 U.S. at 390, as follows:

> *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

453 U.S. at 395 (emphasis in original).

suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. Albertini, supra,* 53 U.S.L.W. at 4847. As shown previously, the Commission's decision furthers important governmental interests unrelated to the suppression of free expression. *See* Part I(C), *supra.* And the decision does so in a way that "is no greater than essential to the furtherance of [those] interest[s]" because the interests "would be achieved less effectively absent the regulation." *Albertini, supra,* 53 U.S.L.W. at 4847. The State's regulation here satisfies the *O'Brien* standard or any other test which the Court deems applicable.

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted,

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July 20, 1985

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No. 84-1044

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION, CONSUMERS UNION,
CONSUMERS FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal From The Supreme Court of California

REPLY BRIEF OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

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No. 84-1044

In the Supreme Court

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Appellees.

On Appeal From The Supreme Court of California

REPLY BRIEF OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant, Pacific Gas and Electric Company (PGandE), hereby submits its reply brief to the briefs on the merits filed by the Public Utilities Commission of the State of California (CPUC or commission) and by Toward Utility Rate Normalization, Consumers Union, Consumer Federation of California and Public Interest Research Group, (collectively referred to hereinafter as "TURN").

The appellees and the *amici curiae* in support of them argue what is not in issue. PGandE is not asserting that the First Amendment has been violated because, in some months, it may be required to pay additional postage if it wishes to include its own message in the billing envelope. (Comm'n Br. at 8; TURN Br. at 5-9.) Nor is it asserting that it is entitled, under the First Amendment, to send its own messages to its customers at ratepayers' expense. (Comm'n Br. at 21-22; TURN Br. at 7.) PGand E is asserting its First Amendment right to be free from government compulsion to carry the messages of others.

PGandE has not argued that its First Amendment rights are absolute, but rather that they may not be abridged without a compelling state interest. There is no issue as to whether the commission can compel PGandE to mail the commission's own notices to utility customers. The commission has failed to meet the standards set forth in *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980) and *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) for regulating the contents of PGandE's envelope.

Appellees' basic argument is that they disagree with *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), *Consolidated Edison* and *Central Hudson*. Moreover, they incorrectly assume that because PGandE is a corporation *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Wooley v. Maynard*, 430 U.S. 705 (1977) do not apply because these cases are allegedly reserved for those who exercise individual freedom of thought. *Bellotti* refutes their argument. Furthermore *Consolidated Edison* held that a state's regulation of speech in a utility's billing envelope requires a compelling state

interest. *Central Hudson* held that a state's regulation of the commercial speech of a utility requires that the regulation directly advances the state's interest; and "if the governmental interest [can] be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." (447 U.S. at 564.)

Hence, the critical issue here is whether the State of California has met the standards for compelling a privately owned public utility to become the courier of the fund solicitation messages of a private party.

I

THE PRINCIPLE ANNOUNCED IN *MIAMI HERALD PUBLISHING CO. V. TORNILLO* APPLIES TO THIS CASE.

A. *Tornillo*'s Principle Is Not Limited To Conventional Media Corporations

This Court, quoting *Lovell v. City of Griffin*, 303 U.S. 444, 451-452 (1938), recently observed, in *Lowe v. Securities and Exchange Comm'n*, ____ *U.S.* ____, *86 L.Ed.2d 130, 147-148 (1985):*

> 'The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'

For over 60 years the billing envelope has been appellant's primary mechanism for communicating with its customers. Even though PGandE is not a newspaper, the principles of *Tornillo*, nevertheless, apply unless the State asserts an interest sufficient to justify its regulation. *Bellotti* refused to adopt the idea that media corporations are entitled to greater First Amendment protection than other corporations. "If we were to adopt appellee's suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by appellants, the result would not be responsive to the informational purpose of the First Amendment." (435 U.S. at 782, n. 18.) If PGandE can be compelled to serve as

a fund raising conduit for TURN or other private groups, then there is no limit to the State's ability to ultimately force other state regulated corporations, whether utility or not, to carry similar messages for any private group asserting an interest in the business of the regulated corporation.[1]

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ____ U.S ____, 105 S.Ct. 2939 (1985), which involved the application of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) to cases where false and defamatory statements do not involve matters of public concern, Justice Brennan, joined by Justices Marshall, Blackmun and Stevens rejected the idea that a non media entity is entitled to less protection than a "media" entity. "Such a distinction is irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual. [Citation omitted]" (105 S.Ct. at 2957, Brennan, J., dissenting, joined by Marshall, J., *Blackmun*, J. and Stevens, J.) Justice Brennan made clear that "the argument that Gertz should be limited to the media misapprehends our cases." (*Id.* at 2958.) According to Justice Brennan:

> We protect the press to ensure the vitality of First Amendment guarantees. [Footnote omitted] This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection. (*Id.* at 2958.)

Justice White, concurring in the judgment and citing *Bellotti*, also emphasized that "this Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten." (*Id.* at 2953, n. 4, White, J., concurring.)

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[1] California extensively regulates many industries, professions, banks and other corporations. In its *amicus curiae* brief, the California Chamber of Commerce, which represents more than 4,800 members from virtually every industry and geographic section in California, explains the potential impact on the numerous other businesses regulated by the State if this Court accepts the State's argument. (*Brief of The California Chamber of Commerce, Amicus Curiae, In Support of Appellant Pacific Gas and Electric Company* at 13-15.)

Chief Justice Burger, concurring separately in the judgment, intimated that he agreed with Justice White's First Amendment observations. (*Id.* at 2948, Burger, C. J., concurring.) The plurality stated that its holding did not mean that Dun & Bradstreet's speech was "subject to reduced constitutional protection because it constitutes economic or commercial speech." (*Id.* at 2947, n. 8, Powell, J., Plurality opin., joined by Rehnquist, J. and O'Conner, J.) The appellees' central argument that PGandE is not entitled to the protection of *Tornillo* has been soundly rejected.

B. *Tornillo* Is Not Otherwise Distinguishable

The principles announced in *Tornillo*, according to appellees, have no implication "here because the Commission's decision does not grant access to *Progress* itself; it merely grants access to the billing envelope—the means of delivery. . . ." (Comm'n Br. at 24.) Under appellees' reasoning, Florida's right of reply statute could have been upheld had it merely required that a separate insert, replying to the editorials, be delivered by the Miami Herald's delivery trucks and newspaper delivery persons—the means of delivery—rather than requiring that the reply be printed in the Miami Herald itself. But separate inserts delivered via the Miami Herald's means of delivery would not have made the Florida statute constitutional.

Tornillo is not limited to "editorial judgment."[2] The *Tornillo* Court would have found the right of access impermissible even if

[2]TURN's claim that "the freedom of editorial judgment which protects newspapers from governmental interference does not apply to speakers engaged in commercial transactions" (TURN Br. at 23) is contrary to law. Moreover, TURN's argument that "the billing envelope, unlike a newspaper, exists primarily to fulfill a commercial transaction" (TURN Br. at 23) and that this "Court has previously intimated that *Tornillo* does not apply to commercial speech" (*Id.*) is equally unsupportable. The appellee in *Bellotti* argued similarly "that First Amendment rights generally have been afforded only to corporations engaged in the communications business or through which individuals express themselves." (*First National Bank of Boston* v. *Bellotti*, 435 U.S. at 781.) Rejecting that argument, the Court emphasized in *Bellotti* that "the press does not have a monopoly on either the First Amendment or the ability to enlighten." (*Id.* at 782.) Finally, the Court explained: "Nor

the incremental cost of delivering those inserts had been paid for by the sender, because "the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual." (*Miami Herald Publishing Co. v. Tornillo, supra*, 418 U.S. at 254.) "If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss that Amendment developed over the years." (*Id.*) It is, therefore, irrelevant whether TURN is seeking to have its fund solicitations printed on the pages of *Progress* or delivered in PGandE's billing envelope because compelled delivery of TURN's messages "fails to clear the barriers of the First Amendment. . . ." (*Miami Herald Publishing Co. v. Tornillo, supra*, 418 U.S. at 258.)

II

THE FIRST AMENDMENT RIGHTS NOT TO SPEAK OR ASSOCIATE EXTEND TO CORPORATIONS, AND ARE NOT RESERVED SOLELY FOR INDIVIDUALS

A. Since The Right Not To Speak Or Associate Serves The Same Ultimate End As The Right To Speak Or Associate, Corporate Identity Is Irrelevant

1. The Right Not To Speak Or Associate Serves The Same Ultimate End As The Right To Speak Or Associate

Both TURN and the commission argue strenuously that PGandE is not entitled to protection of what they call "negative" First Amendment rights.[3] TURN, for example, claims that: "It is readily apparent that the design and purpose of the First Amend-

do our recent commercial speech cases lend support to appellee's business interest theory." (*Id.* at 783.)

[3] This Court has not labeled First Amendment rights as "negative" or "affirmative", but instead has held that the First Amendment protects both the right to speak and to refrain from speaking, as well as the right to associate and not to associate. Appellees' extensive reliance upon "affirmative" and "negative" First Amendment rights apparently is based on a law review article. (See Gaebler, *First Amendment Protection Against Government Compelled Expression And Association*, 23 B.C.L. Rev. 995 (1982).)

ment do not support equivalence between the 'affirmative' rights to speak and associate freely and the 'negative' rights not to speak and associate." (TURN Br. at 13.) The commission contends similarly that its decision is valid because "unlike *Bellotti and Consolidated Edison*, the State has placed no cognizable restriction on protected affirmative speech." (Comm'n Br. at 20.)

Just recently, in *Harper & Row, Pub., Inc. v. Nation Enterprises,* ___ U.S. ___, 85 L.Ed.2d 588 (1985), the Court suggested that there is no appreciable difference between "affirmative" and "negative" First Amendment rights. Citing *Wooley*, the Court said that "freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.' " (*Id.* at 606.) Justice O'Connor, writing for the Court, cited approvingly the words of New York's Chief Judge Fuld who said that the right not to speak serves the same ultimate purpose as the right to speak:

> 'The essential thrust of the First Amendment . . . shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect. Estate of Hemingway v. Random House, 23 NY2d 341, 348, 244 NE2d 250, 255 (1968).' (*Id.*) (emphasis in original).

TURN's claim that "[a] compulsion to speak, unlike a prohibition of speech, does not stifle the First Amendment interchange and thus does not endanger the 'marketplace of ideas,' " (TURN Br. at 14) ignores a basic tenet of the First Amendment. It fails to recognize that the First Amendment "protects against compelled expression or association of any sort so long as it is not outweighed by a countervailing government interest." (Gaebler, *First Amendment Protection Against Government Compelled Expression and Association,* 23 B.C.L. Rev. 995, 996, n. 3 (1982); see also, *Wooley v. Maynard, supra,* 430 U.S. at 716.) Thus, *Wooley* is not limited to individuals; it applies to corporations as well.

2. Corporate Identity Is Irrelevant To The Right Not To Speak Or Associate

It matters not whether the speaker is an individual or a corporation, a State cannot compel the carrying of someone else's message unless "the State's countervailing interest is sufficiently compelling to justify" (*Wooley v. Maynard, supra,* 430 U.S. at 716) the forced association. *Wooley,* which relied specifically upon *Tornillo,* was "faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." (*Id.* at 713.) In *Bellotti*, which specifically involved the application of the First Amendment to corporations, the Court addressed the issue "whether the corporate identity of the speaker deprives . . . speech of what otherwise would be its clear entitlement to protection" (435 U.S. at 778) and held that is does not. Requiring PGandE to use its own billing envelope to mail TURN's fund solicitations constitutes no less a compulsion than in *Wooley* or that held impermissible in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). It forces PGandE to foster and associate with an ideological activity it prefers not to foster or be associated with.[4] Moreover, *Tornillo* and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) also "rest on the fundamental principle that the coerced publication views, as much as their

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[4] Expressing its concerns about forced association, this Court in *Abood* emphasized the opposition of First Amendment authors James Madison and Thomas Jefferson to forced association:

> This view has long been held. James Madison, the First Amendment author, wrote in defense of religious liberty: 'Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' 2 The Writings of James Madison 186 (Hunt ed. 1901). Thomas Jefferson agreed that 'to compel a men to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' [Citation omitted.] *Abood v. Detroit Board of Education, supra,* 431 U.S. at 234-235, n. 31.

suppression, violates the freedom of speech." (*Herbert v. Lando*, 441 U.S. 153, 178, n. 1, (1979) (Powell, J., concurring).) This principle applies without regards to corporate identity.

B. The Right Not To Speak Or Associate Is Not Based On Individual Freedom Of Thought

Whether PGandE has individual freedom of thought is not relevant to this appeal. "In cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual or association was involved [citations omitted]." (*First National Bank of Boston v. Bellotti, supra*, 435 U.S. at 778, n.14.) The commission claims that: "The interest underlying the First Amendment rights to refrain from speaking and to refrain from associating with the views of another . . . is very different from the broad societal interest identified in *Bellotti, Consolidated Edison*, and *Tornillo*." (Comm'n Br. at 36.) This assertion, however, directly contradicts *Bellotti* because: "The Constitution often protects interests broader than those of the party seeking their vindication. . . . The proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the regulation] abridges expression that the First Amendment was meant to protect."[5] (*First National Bank of Boston v. Bellotti, supra*, 435 U.S. at 776.)

Limiting First Amendment rights only to those who have "individual freedom of thought" would, indeed, ultimately pose a serious danger to First Amendment rights in general. "It is open to question whether limitations can be placed on the free expression rights of some without undermining the guarantees of all." (*Id.* at 798, n.2 (Burger, C.J., concurring).) Contrary to the

[5] The commision's contention that PGandE's First Amendment rights are significantly diminished because "the California regulatory scheme leaves little in the way of private corporate autonomy to its regulated utilities" (Comm'n Br. at 40) cannot be squared with this Court's opinion that: "Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights." (*Consolidated Edison Co.* v. *Public Service Comm'n, supra*, 447 U.S. at 534, n.1.)

arguments of appellees. "the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms." (*Id.* at 802, Burger, C.J., concurring.) This, of course, includes appellant.

C. *PruneYard* Does Not Rest On The Principle That Rights Not To Speak Or Associate *Are Reserved To Individuals*

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), upheld a state law requiring that shopping center property, already open to the public to come and go as it pleased, could not be closed to those who desired to speak or gather signatures. TURN argues that *PruneYard* applies here rather than *Wooley* and *Barnette* because these cases dealt with individual freedom of mind whereas *PruneYard* did not. (TURN Br. at 33-36.) *PruneYard* not only does not support this argument, it does not even suggest that its holding was in any way related to the shopping center's lack of individual freedom of mind. Nor did the *PruneYard* Court distinguish *Wooley* or *Barnette* on this basis.

Wooley was distinguished not on the basis that the individuals in *Wooley* could exercise individual freedom of mind, and that a shopping center cannot, but rather, *inter alia*, on the "important" fact that "the shopping center by choice of its owner is not limited to the personal use of appellants." (*PruneYard Shopping Center v. Robins, supra*, 447 U.S. at 87.) "It is instead a business establishment that is open to the public to come and go as they please."[6] (*Id.*) Nor was *Barnette* distinguished by the *PruneYard* Court on the basis that individual freedom of thought does not apply to shopping centers. Rather, it was distinguished on the

[6] *PruneYard* is quite different from the instant case in several other important aspects. First, unlike a billing envelope, which is closely associated with the sender, it is extremely remote and highly unlikely that anyone would think the shopping center owners favored the high school student petitioners there. Second, unlike in *PruneYard*, PGandE has an affirmative duty to use "its equipment" (J.S., app. at 23) to publish in its billing envelope a particular message written by TURN. When an envelope is received, which carries the name of the sender, as does the PGandE envelope, the assumption is that the message therein belongs to the sender or is at least endorsed by the sender.

basis that "it involved the compelled recitation of a message containing an affirmative belief." (447 U.S. at 88.) *PruneYard* does not apply to a billing envelope. This was implicitly recognized by Justice Marshall's concurring opinion: "*The California Supreme Court's decision is limited to shopping centers*, which are already open to the general public."[7] (*Id.* at 94, Marshall, J., concurring.) (emphasis added).

In short, *PruneYard* did not permit the government to require PruneYard to open portions of the shopping center that were closed to the public; nor did it permit government to choose the speakers allowed to speak. It would not, finally, have permitted the government to require PruneYard advertisements and mailings to include others' messages. *PruneYard* offers no support for the commission's order that PGandE become the courier of TURN's fundraising messages.

III

THE FIRST AMENDMENT RIGHTS NOT TO SPEAK OR ASSOCIATE ARE NOT MADE IRRELEVANT TO THIS CASE BY THE NATURE OF THE BILLING ENVELOPE

A. Application Of These Rights Cannot Be Avoided By Classifying The Billing Envelope As A "Passive Receptacle"

TURN defines the billing envelope as "a passive receptacle or conduit" (TURN Br. at 25) and concludes it is not entitled to the First Amendment protections set forth in *Consolidated Edison.*[8]

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[7] Justice White, also concurring in *PruneYard,* was agreeable to permitting "entry on [shopping center] property for the purpose of communicating with the public about subjects having no connection with the shopping centers' business" (*Id.* at 95, White, J., concurring); but he foresaw the danger in a blanket extension of the application of *PruneYard* when he asked: "May a State require the owner of a shopping center to . . . [furnish] a convenient place for them to urge their views on the public and to solicit funds from likely prospects?" (*Id.* at 96, White, J., concurring.)

[8] An envelope is the mechanism by which one uses the mail system. Without it there can be no communications. It is an inseparable part of communicating through the mail, and as such, it is an integral part of

But this argument is contrary to *Consolidated Edison.* Under TURN's analysis, had New York simply defined Consolidated Edison's billing envelope to be a "passive receptacle" it could have precluded Consolidated Edison from inserting its messages therein. But, the *Consolidated Edison* Court would have also rejected this approach since regulating speech in the utility's envelope must be judged by "whether the State can demonstrate that its regulation is constitutionally permissible." (*Consolidated Edison, supra,* 447 U.S. at 535.)

The same compelling interest standard applied to the utility billing envelope in *Consolidated Edison* also applies here. Otherwise, *Consolidated Edison's* holding becomes illusory. All New York need do, under TURN's rationale, to change the application of *Consolidated Edison,* is simply rule that the billing envelope is "a passive receptacle or conduit" which has "no identity of its own as a medium of communication." (TURN Br. at 25.) As such, New York could then prohibit the inclusion of utility messages in this "passive receptacle." *Consolidated Edison* does not support such a ploy. It, therefore, matters not whether New York is prohibiting Consolidated Edison from speaking in the envelope or California is compelling PGandE to put TURN's messages therein, the regulation is nevertheless subject to strict scrutiny.

B. Application Of Those Rights Cannot Be Avoided By Classifying The Empty Space In The Billing Envelope As "Ratepayers' *Property*" *Or "Government Property"*

As PGandE points out in its brief, its consitutional rights cannot be abridged by merely classifying the empty space in the billing envelope as ratepayer property. (PGandE Br. at 30-32.) The commission now asserts that its order can be upheld on a new theory that " [t]he billing space is a nonpublic forum over which

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speech. For example, in *Lamont v. Postmaster General,* 381 U.S. 301 (1965), the Court quoted approvingly language from *Milwaukee Pub. Co. v. Burleson,* 255 U.S. 407, 437 (1921) (Holmes, J., dissenting): " 'The United States may give up the Post Office when it sees fit, but the use of the mails is almost as much a part of free speech as the right to use our tongues. . . .' " (*Lamont, supra,* at 305.) Envelopes are "tongues" for communicating via the mail.

the Commission, by its broad regulatory powers, has the right to make distinctions in access on the basis of subject matter and speaker identity." (Comm'n Br. at 34.) Although the commission did not rely in its decision on this ground, it now relies on a series of cases that deal with the government's right to control access to government property.[9]

Even if the nonpublic forum argument were properly before the Court, it would be completely without merit. The analogy of a utility's billing envelope to a public facility has already been rejected. In *Consolidated Edison*, New York relied heavily on *Greer v. Spock*, 424 U.S. 828 (1976) and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), as does TURN here, to argue that the billing envelopes are similar to public facilities. Responding, the Court said:

> The analysis of *Greer* and *Lehman* is not applicable to the Commission's regulation of bill inserts. In both cases [*Greer* and *Lehman*], a private party asserted a right of access to public facilities. Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. *Rather it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy*. (447 U.S. at 539-540.) (emphasis added).

In *Perry Educational Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), the Court distinguished *Consolidated Edison* from cases involving access to government property. "Indeed in *Consolidated Edison*, which concerned a utility's right to use its own billing envelope for speech purposes, the Court expressly

[9] In *Consolidated Edison*, the New York commission claimed that its action "would prevent ratepayers from subsidizing the cost of policy-oriented bill inserts." (*Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. at 543.) Not having made that argument in the proceedings below, New York's argument was rejected. "The Commission did not rely on the argument that the use of bill inserts required ratepayers to subsidize the dissemination of management's view in issuing its order, and we therefore are precluded from sustaining the order on that ground. (Cf. *SEC. v. Chenery Corp.*, 318 U.S. 80, 95 (1943)" (*Id.* at 544, Marshall, J., concurring).)

distinguished our public forum cases, stating that 'the special interest of government in overseeing the use of its property' were not implicated." (*Id.* at 49, n. 9.)

In public forum cases, the question has been whether persons have a constitutional claim of access to public property. This case does not deal with a claim that access is being denied to what the commission has suddenly declared to be public property.[10] If the theory of the public forum cases were applied to utility billing envelopes, however, the commission could properly decide that the sole purpose of the envelope is to communicate billing information and deny PGandE access to include *Progress* therein. Hence, the holding in *Consolidated Edison* would be illusory because it could be overturned by fictional definitions or redefinitions of property interests in the empty space of the billing envelope. *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), on which the commission places great emphasis, underlines this point. Justice Stevens, in dissent, argued that public forum theory was inapplicable to access to letterboxes because they were owned by homeowners. That argument was rejected or ignored by all other members of the Court, who analyzed the right of access to letterboxes without reference to whether those boxes were owned by the postal service or homeowners. Similarly, in this case, the First Amendment issues do not turn on the abstract metaphysical question of ownership of the empty space in the billing envelope. Just as First Amendment rights were denied in *Consolidated Edison*, regardless of who owned the empty space in the billing envelope, they are also denied here no matter where state law places the "ownership" interest.

[10] In *City Council of Los Angeles v. Taxpayers For Vincent*, ____ U.S. ____, 104 S. Ct. 2118, 2134, n. 31 (1984), the Court rejected the idea that merely because property is owned or controlled by the government it may be used for communication.

C. Application Of These Rights Cannot Be Avoided By Classifying The Contents Of The Billing Envelope As Commerical Speech

TURN claims that regulations concerning the contents of the billing envelope are justified because "[t]he billing envelope exists primarily for the furtherance of a commercial transaction." (TURN Br. at 23.) PGandE's right not to carry TURN's message does not relate to commercial speech, but even if it is characterized as commercial in nature, it is still protected by the First Amendment and "[t]he State must assert a substantial interest to be achieved by [its] restrictions. . . ." (*Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra,* 447 U.S. at 564.)

Therefore, even if PGandE's envelope is classified as commercial, it is still protected by the First Amendment; and the State cannot compel PGandE to carry TURN's messages unless it meets the standards for regulating commercial speech. (See also, *Zauderer v. Office of Disciplinary Council,* ___ U.S. ___, 85 L.Ed. 2d 652, 671 (1985) ("... broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force.")) Hence, California has the burden, which it has failed to meet, of at least complying with the test set forth in *Central Hudson:*

> The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. *The limitation on expression must be designed carefully to achieve the State's goal.* Compliance with this requirement may be measured by two criteria. First, *the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.* (*Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra,* 447 U.S. at 564.) (emphasis added).

IV

THE COMMISSION'S ORDER IS BASED ON EVALUATION OF THE VIEWPOINTS OF TURN AND OTHER POTENTIAL SPEAKERS

A. PGandE Is Not Asserting The Rights Of Speakers Who Might Be Denied Access To The Billing Envelope, But Is Asserting Its Own Right Not To Carry The Messages Of Others; This Argument Is Not Premature

The commission argues that PGandE lacks standing to make its claim that the choice of speakers entitled to access to the billing envelope involves prohibited viewpoint discrimination, because "it has no standing to raise the claims of third parties *who are its adversaries.*" (Comm'n Br. at 28.) (emphasis added). PGandE, however, is not asserting the rights of those who have, in the past, or may, in the future, be denied access. PGandE is asserting its own First Amendment right not to carry the messages of others. It is precisely because those whose messages PGandE will be required to carry will emanate from those "who are its adversaries," (*Id.*) that the abridgment of PGandE's rights is exacerbated. PGandE is not complaining of the standards the commission may employ to pick and choose among its adversaries, but of a state policy, prohibited by the First Amendment, that emphasizes the adversity of the speaker's position to PGandE as the reason PGandE must carry the message.[11]

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[11] The commission's argument that its regulation is a valid time, place and manner regulation because TURN has "no comparable channel of communication" (Comm'n Br. at 33) does not meet the test for the application of the time, place or manner doctrine. As explained in PGandE's brief on the merits, "Time, place or manner restrictions apply only when regulating an already existing, independent right to exercise protected rights." (PGandE Br. at 21.) But, even if the doctrine did apply, the commission's decision still fails the *Consolidated Edison* test because it does not serve a significant governmental interest, nor is it narrowly tailored. (447 U.S. at 536.) Moreover, the order "not only promotes one viewpoint at the expense of others, but also provides public access to a traditionally private forum. . . . [S]uch a regulation cannot be upheld as a reasonable time, place, and manner restriction." (*Oregon*

The same distortion of PGandE's position is reflected in the commission's argument that PGandE's content-based discrimination claim is "premature" because "[t]he Commission's decision does not refuse billing envelope access to any one, and there is no certainty it will ever do so." (Comm'n Br. at 28.) On October 17, 1984, the commission in *Committee of More Than 1 Million California Taxpayers To Save Prop. 13 v. Pacific Gas and Electric Company et al.* (Decision No. 84-10-062, Oct. 17, 1984; J.S., app., p. 157.) did, in fact, refuse billing envelope access to a political group. Although the group alleged that ratepayers would benefit from receiving accurate information about the ballot proposition, the commission, nevertheless, disagreed claiming the group's bill inserts would not "improve consumer participation in our proceedings." (J.S., app., at 161.)

B. The Choice Of Speakers Whose Messages PGandE Must Carry Inevitably Rests On Viewpoint Discrimination; TURN Was Chosen Because It Presented A Consumer Viewpoint Opposed To That Of PGandE

Appellees' arguments that the selection of TURN as the speaker to use PGandE's envelope is not viewpoint based, but rather permissible "viewpoint-neutral distinctions based on speaker identity in order to ensure that the purposes it [the commission] sought to achieve in opening up the billing envelope are satisfied" (TURN Br. at 45) are contrary to the facts of this case. TURN was chosen by the commission, by its own admission, because TURN's selection would give "residential ratepayers in PGandE's service territory . . . an opportunity to be informed of and to support advocacy efforts on their behalf through use of the extra space in the billing envelope." (J.S., app. at 16.) It was not chosen because of what it intended to say on behalf of commercial, industrial or other classes of ratepayers.[12]

Independent Telephone Ass'n v. *Citizens' Utility Board of Oregon*, Civ. No. 85-875-PA, D. Ore., decided Sept. 10, 1985; slip op. at 9.)

[12] On September 10, 1985, the United States District Court for the District of Oregon struck down a similar provision of Oregon law which required Oregon utilities to include utility consumer inserts in the billing envelope. (*Oregon Independent Telephone Ass'n v. Citizens' Utility Board of Oregon*, (Civ. No. 85-875-PA, D. Ore., decided Sept. 10, 1985.)) The court made clear that: "By providing a forum for the interest of utility consumers only, the Act favors one viewpoint at the expense of others and is not content neutral." (*Id.*, slip op. at 6-7.)

Like in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 102 (1972), the selection here of TURN "is based on the content of [its] expression."

Finally, the appellees claim that the content of TURN's message is left to TURN. This is irrelevant because: "Even when the state does not mandate a particular message, first amendment interests are affected when the state forces a property owner to admit third-party speakers." (*Oregon Independent Telephone Ass'n v. Citizens' Utility Board of Oregon.* (Civ. No. 85-875-PA, D. Ore., decided September 10, 1985; slip op. at 7 (holding unconstitutional an Oregon bill insert statute similar to the commission's order.))

V

ALL STATE INTERESTS ASSERTED TO JUSTIFY ABRIDGMENT OF PGandE's FIRST AMENDMENT RIGHTS ARE EITHER ILLEGITIMATE OR COULD EASILY BE ACHIEVED WITHOUT ABRIDGING THE EXERCISE OF PROTECTED FIRST AMENDMENT RIGHTS

As pointed out in PGandE's brief on the merits, "all of the identified governmental interests could be easily achieved by means which do not in any way infringe PGandE's First Amendment rights." (PGandE Br. at 37.) PGandE is not asserting that its First Amendment rights not to speak or not to associate are absolute or "that government may never require a person to convey a message not his own." (TURN Br. at 18.) Rather, it is contending that this abridgement must be justified by a compelling state interest. And, even if the lesser First Amendment standards suggested by appellees are adopted, all asserted state interests are either impermissible or easily achieved by other means.[13] Two related arguments merit further brief comment.

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[13] The commission's regulation cannot survive the *Central Hudson* standards for regulating commercial speech because it does not directly advance consumer participation in rate proceedings. The regulation fails

A. The Asserted Interest In Exposing PGandE Customers To Views That Differ From Those Of PGandE Is An Interest Inconsistent With The First Amendment When It Is Accomplished By Requiring PGandE To Carry Those Views

TURN argues that the commission's order will enable "the ratepayers to receive information through the billing envelope from a variety of sources thus [promoting] a core First Amendment value." (TURN Br. at 39.) This argument is inconsistent with *Buckley v. Valeo*, 424 U.S. 1 (1976). This claim is similar to the argument rejected in *Buckley* "that the ancillary governmental interest in equalizing the relative ability of individuals and groups" (*Buckley v. Valeo, supra*, 424 U.S. at 48) was sufficient to infringe First Amendment freedoms. Here, TURN says the government's interest is to "expose the ratepayers 'to a variety of views' and thus assure 'more complete ratepayer understanding . . . [of] energy issues involving their utility.'" (TURN Br. at 39.) This is not only an anti-First Amendment argument, but there is no authority for the proposition that the First Amendment permits California to abridge PGandE's rights in order to enhance TURN's voice. A similar interest was expressly rejected by the

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the test that excessive restrictions cannot survive when the end can be achieved by more limited restrictions. California's alleged goals can be directly, not remotely, achieved by awarding intervenor fees as allowed by law in California. (See J.S. app. at 151.) The only limitation placed on TURN's use of funds collected from bill insert solicitations is the general requirement that the funds "be solely for purposes related to ratepayer representation in Commission proceedings involving PGandE." (J.S., app. at 32.) TURN need not show that it used the funds collected to directly advance the state's interest. Intervenor fees would, however, directly advance the state's interest because they cannot be awarded unless the commission finds, *inter alia*, that TURN made "a substantial contribution to the adoption, in whole or in part, of the commission's order or decison." (J.S., app. at 154.) No such requirement is needed under the commission's bill insert order. Moreover, unlike the statute (J.S., app. at 155), there are no procedures for an audit of the use of the funds collected through bill inserts. Finally, the statute does not discriminate as does the Commission's order on the basis of viewpoint. The decision below falls far short of the requirements of *Central Hudson*.

Buckley Court as being contrary to the First Amendment. "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." (424 U.S. at 48-49.)

B. The Asserted Interest In Exposing PGandE Customers To Other Views Is Not Validated By The False Assertion That PGandE Has A Monoply On Communications With Its Ratepayers

The commission's anti-First Amendment interest is not validated by the assertions that PGandE has available to it channels of communication to its customers that are unavailable to organizations such as TURN. The commission argues that it may be unable to disclose PGandE's customer lists to third parties for any purpose, and thus no one but PGandE will be able to address PGandE customers. (Comm'n Br. at 33.) The commission's claim that a California decision forbidding warrantless searches for unlisted names and addresses in criminal cases (*People v. Chapman*, 36 Cal.3d 98, 201 Cal.Rptr. 628, 679 P.2d 62 (1984) forbids it to release mailing lists to organizations like TURN (Comm'n Br. at 33, n. 35) is fanciful. Where there are state interests that can be easily achieved without abridging First Amendment rights, the state cannot disable itself from doing so, and then argue that it has an interest—compelling or otherwise—in complying with its own law.[14]

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[14] The state's asserted interest in *Consolidated Edison*, of negating the utility's "free ride," was not compelling because it could be achieved by adjustments in the rate-making process without denying the utility the right to speak. That interest would not have become "compelling" if state law had not permitted the rate-making adjustment. It would, of course, be irrelevant whether the state's self-imposed disability was contained in statute or the state constitution. California's argument that it has an interest, sufficient to justify abridgment of First Amendment rights, in complying with its own constitution, (Comm'n Br. at 33) would impermissibly permit the state to abridge First Amendment rights by disabling itself from accomplishing its objectives by other less restrictive means. (See *Widmar v. Vincent*, 454 U.S. 263, 273-276 (1981).)

Finally, the asserted monopoly in communication enjoyed by PGandE is irrelevant in this case. (Comm'n Br. at 45, n. 48.) It is clear that cases such as *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), do not rest on broadcasters' monopoly on communication, just as it is clear that the newspaper's actual monopoly in *Tornillo* did not justify abridgement of the newspaper's right not to carry the messages of others. *Red Lion*, as this Court explained later, allowed access because "a broadcaster communicates through use of a scarce, publicly owned resource" (*Consolidated Edison Co. v. Public Service Comm'n, supra*, 447 U.S. at 543) and because "[n]o person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails." (*Id.*) The issues in this case cannot be resolved by asking whether the empty space in a billing envelope is more "like" a newspaper or more "like" a radio or television station. Whatever restrictions imposed must meet First Amendment standards. The decision below does not meet First Amendment standards.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California, upholding the decision of the commission should be reversed; and the commission's decision should be vacated.

Respectfully submitted,

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No. 84-1044

In The

Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, TOWARD UTILITY RATE NORMALIZATION, CONSUMERS UNION, CONSUMERS FEDERATION OF CALIFORNIA, COMMON CAUSE OF CALIFORNIA, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, and CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,

Appellees.

On Appeal from the Supreme Court of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CONSUMER ALERT IN SUPPORT OF APPELLANT, PACIFIC GAS AND ELECTRIC COMPANY

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CONSUMER ALERT IN SUPPORT OF APPELLANT, PACIFIC GAS AND ELECTRIC COMPANY

INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of Pacific Legal Foundation (PLF) and Consumer Alert pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized and existing under and by virtue of the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy of PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The PLF Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of an amicus curiae brief in this matter.

Consumer Alert is a nonprofit corporation organized and existing under the laws of the District of Columbia, with offices in Modesto, California. Consumer Alert engages in the study and dissemination of information on problems and issues affecting American consumers and seeks to insure a fair and fully expositive presentation of matters affecting the public interest. Consumer Alert has approximately 6,500 members, supporters, and contributors from all areas of the country, including California. Members of the organization are able to participate fully in its proceedings and include California taxpayers, consumers, and users of electricity. Policy for Consumer Alert is set by a 12-member Board of Directors. The Board has authorized Consumer Alert to participate as amicus in this action.

Amici firmly believe that a review of this matter is necessary in order that the constitutional issues involved may be properly considered. The decision below granting an outside party the right to insert its material in mailings by Pacific Gas & Electric Company (PG&E) not only

violates the free speech and association rights of that utility, but also raises a substantial issue as to the propriety of government granting favored parties the right to speak while denying such right to others.

—o—

STATEMENT OF THE CASE

In its Decision No. 83-12-047, dated December 20, 1983, modified by Decision No. 84-05-039, dated May 2, 1984, the Public Utilities Commission (PUC) of the State of California ordered PG&E, over PG&E's opposition, to insert in its billing envelopes materials from Toward Utility Rate Normalization (TURN), a private organization unrelated to PG&E. Under the order, PG&E is required to give TURN access to its billing envelopes four times a year for the next two years. The California Supreme Court denied review of this order in an unreported order on October 4, 1984.

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SUMMARY OF ARGUMENT

PUC's conclusion that the extra space in utility billing envelopes may be awarded to outside parties violates existing holdings of this Court that the envelope and its contents are the private property of the utility. The First Amendment freedom against forced association precludes PUC from compelling a utility to disseminate the views of outside parties with whom it may disagree. The First Amendment further precludes the state from selecting

who may, and who may not, use private property to speak to the public.

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ARGUMENT

I

THE CONCLUSION THAT THE EXTRA SPACE IN BILLING ENVELOPES BELONGS TO RATEPAYERS CONTRADICTS COURT HOLDINGS BINDING ON THE COMMISSION

The basic premise of the PUC decision, that the "extra space" in the PG&E billing envelope belongs to the ratepayers (PUC Decision No. 83-12-047 at 4-5) is wrong as a matter of law. PUC's incorrect rationale is that while the bill and necessary legal notices which may be included in the envelope are a necessary part of providing utility service to the customer, the use of any "extra space" in the envelope may not, under principles of equity, be considered PG&E property because it would provide "PG&E with a benefit beyond the mailing expense legitimately recoverable from the ratepayers." *Id.* at 5. Thus, PUC concludes that permitting PG&E to continue to use this space for publication of its newsletter, *Progress,* would "unjustly enrich PG&E and simultaneously deprive the ratepayers of the value of that space . . . ." *Id.*

That conclusion expressly contradicts holdings of this Court which are binding on the commission. *Board of Public Utility Commissioners v. New York Telephone Company,* 271 U.S. 23 (1926), rebuts the PUC conclusion that payment for services by utility customers creates any "equitable" interest in utility property used to render

services. "The relationship between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. [Citation omitted.] The revenue paid by the customers for service belongs to the company." *Id.* at 31.

This Court thus rejected PUC's theory that the utility has an "equity" obligation toward its ratepayers. The opinion reemphasized this holding in the quoted statement: "Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses . . . . *By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience* . . . ." *Id.* at 32 (emphasis added).

The return envelope, the bill, the PG&E newsletter, and the space necessary in the billing envelope to transmit them to the customer are provided for the convenience of the ratepayer, but this Court made clear that the customer does not acquire any interest, including "equitable" interest, in the envelope or its interior space, "extra" or otherwise, used to transmit these materials.

The PUC decision attempts to distinguish the *New York Telephone* case, saying the "Supreme Court was clearly not prohibiting ratepayers from having property rights in objects associated with the utility's enterprise . . . ." PUC Decision No. 83-12-047 at 34. The above quoted passages from the case make clear that this was exactly what this Court was saying.

The precise issue of who owns the space in the billing envelope was resolved in favor of the utility in *Consolidated Edison Company of New York, Inc. v. Public*

Service Commission, 447 U.S. 530 (1980). There this Court prohibited PUC's New York counterpart from restricting the utility's use of the extra space in its billing envelope. In that case the commission was merely trying to restrain the utility from using the extra space as a vehicle to promulgate its own views. Here, PUC is forcing the utility to use the extra space as a vehicle to promulgate views of an outside third party with which the utility may not agree. This Court made clear that the commission had no authority to attempt to regulate the utility's use of the extra space in the billing envelope because it was not public property. The Court drew the specific distinction between the private property of the billing envelope space and the public property of the military base and city transit buses in *Greer v. Spock,* 424 U.S. 828 (1976), and *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974).

> "Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize *its own billing envelopes* to promulgate its views on controversial issues of public policy. The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. [Citation omitted.] But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property." *Consolidated Edison,* 447 U.S. at 539-40 (emphasis added).

This holding was repeated in *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983), in which the Supreme Court noted that the *Consolidated Edison* case did not concern access to government property. "Indeed, in Consolidated Edison, which concerned a utility's right to use *its own billing envelopes* for speech purposes, the Court expressly distinguished our public forum cases . . . ." *Perry Education Ass'n,* 460 U.S. at 49 n.9 (emphasis added).

Thus, this Court ha specifically found that the space in a utility billing envelope is not a public forum as PUC would make it, but is the private property of the utility. The envelope extra space does not belong to the public, neither to the ratepayer nor to PUC. It belongs to the utility which may use it for its owa purposes. PUC has no authority to prohibit or otherwise restrict a utility from using its own envelopes to carry its own newsletters. Indeed, PUC is prohibited by the First Amendment from doing so.

As this Court put it: "The bill insert prohibition does not further a governmental interest unrelated to the suppression of speech." *Consolidated Edison,* 447 U.S. at 590 n.9.

II

A UTILITY MAY NOT BE COMPELLED TO DISSEMINATE THE VIEWS OF OUTSIDE PARTIES

Where *Consolidated Edison* merely dealt with the issue whether the state agency could keep the utility from speaking, the PUC decision raises the issue whether PG&E can be forced to promulgate the views of others with which and whom it may disagree. The issue was

well framed and resolved in *Wooley v. Maynard,* 430 U.S. 705, 713 (1977):

> "We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so."

This Court noted that the right of freedom of thought protected by the First Amendment, made applicable to states by the Fourteenth Amendment, includes not only the right to speak but the right to refrain from speaking. *Id.* at 714. Thus, in *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974), it was held that a Florida "right to reply" statute which granted political candidates equal space to reply to newspaper criticism violated the First Amendment. The Court there declared:

> "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.* at 258.

Concurring that same term in *Lehman v. City of Shaker Heights,* 418 U.S. at 306, Justice Douglas observed that the meaning of *Miami Herald* is that no one, whether the owner of a newspaper or a bus line can "be forced to include in his offerings news or other items which outsiders may desire but which the owner abhors."

PG&E's *Progress* may not rise to the journalistic level of the *Miami Herald,* but it is an offering by its

owner. And so is the billing envelope. The First Amendment does not permit its owner to be forced to forego the *Progress* in order to include in its billing envelope the items which PG&E abhors but are desired by outsiders such as TURN. Like the school teachers in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), PG&E falls within the protection of the First Amendment cases "because they have been prohibited, not from actively associating, but rather from refusing to associate." *Id.* at 234.

PUC's rationale in ordering PG&E to insert TURN's messages in PG&E envelopes is that it is not ordering the utility to publish TURN material as its own. PUC Decision No. 83-13-047 at 30-31. This analysis, consisting of little more than a page, is superficial in the extreme. PUC is ordering PG&E to accept, insert, commingle, and disseminate outside material with its own in the PG&E envelope. PG&E is thereby forced to associate itself with the TURN material. That is the crux of the First Amendment violation. Like the New Hampshire statute struck down in *Wooley,* PUC's decision requires that PG&E "use their private property as a 'mobile billboard' for the State's ideological message. . . ." *Wooley,* 430 U.S. at 715. Here, PUC is requiring PG&E to donate its property as a postal billboard to serve the ideological whims of the commission and, since the message borne by the utility is one forced upon it, the decision violates the First Amendment freedom against forced association.

Appellees seek to distinguish *Wooley* by citing *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980). *See e.g.,* TURN's Motion to Dismiss at 20-22. But appellees overlook the basis of *PruneYard's* distinction.

> "Most important, the shopping center by choice of its owner is not limited to personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message." *Prune-Yard,* 447 U.S. at 87.

But here, PG&E's billing envelope has not been open to the public to come and go as they please. Indeed, that is the crux of this case: the utility's desire to exclude outsiders from use of its billing envelope. Second, *Prune-Yard's* space was opened to all the public to speak. But here, even if no specific message is dictated by the state, PUC is very plainly dictating the messengers who will be permitted to speak from PG&E's property. PUC's recent Decision No. 84-10-062, dated October 17, 1984, denied the petition of the Committee of More Than One Million California Taxpayers to Save Proposition 13 the use of the billing envelope space. As discussed in the following argument, PUC's ruling in that decision raises the gravest of questions as to the dangers of governmental discrimination for or against particular messages or particular messengers.

III

THE FIRST AMENDMENT PRECLUDES PUC FROM CHOOSING PARTICIPANTS IN THIS FORUM

Perhaps the most disturbing aspect of this case is that in turning PG&E's billing envelope into a forum,

PUC is already choosing the parties who may and may not participate in that forum. And, most disturbingly, PUC is prohibiting access to this forum based on the identity of the applicants and the contents of their intended speech.

In justification for forcing PG&E to disseminate TURN's views PUC cited a compelling state interest in the "'fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy related issues.'" PUC Decision No. 83-12-047 at 22. This lofty ideal lasted only until PUC Decision No. 84-10-062, dated October 17, 1984. That decision dealt with the request of the Committee of More Than One Million California Taxpayers to Save Proposition 13 for access to the extra space in utility billing envelopes for the purpose of providing information on the effects of Proposition 36 on utility rates (Decision Finding No. 1). The request was quickly denied on the basis that it did not allege that the committee has participated or intends to participate in PUC proceedings (Decision Finding No. 2) and that the request did not allege that the committee's use of the extra space will improve consumer participation in PUC proceedings (Decision Finding No. 3).

The decision leaves the unfortunate impression that PUC in denying access space to newcomers is supporting a classic "old boy" network of favored prior participants in its proceedings. By granting access to utility private property to some and not to others PUC fails to further the state interest claimed to justify the intrusion on First Amendment rights. If anything, the policy expressed in

the *Committee of More Than One Million* decision allows PUC not only to choose the permissible subjects for debate, but the debaters as well. Thus, PUC puts itself in position to control the search for political truth. *Consolidated Edison,* 447 U.S. at 538. The concept of equality of ideas is inherent in protection of free expression:

> "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' [footnote omitted] and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Police Department v. Mosley,* 408 U.S. 92, 96 (1972).

PUC's exercise of arbitrary and total control over the identity of the speaker and the type of speech permitted or prohibited in PG&E's envelopes shows the wisdom of the *Mosley* rule. The First Amendment does not permit government to seize private property and divert it into a forum in which only those groups favored by the government may speak.

—o—

CONCLUSION

In its Decision No. 83-05-13 as amended by No. 84-05-039, PUC has created a shocking intrusion not only upon PG&E's private property rights but upon the

First Amendment rights of the California utility ratepayers. In establishing arbitrary and adjustable criteria which grant to some favored outsiders the right to a free ride in the utility billing envelope, while denying that right to other parties less favored, PUC establishes a dangerous precedent. In order to guard against such selective determination by government as to who may use a forum and who may not, it is surely the safer path to prohibit PUC from entering this quagmire of discrimination. Amici, PLF and Consumer Alert, therefore urge that the decision of the California Supreme Court affirming the PUC decisions be reversed.

DATED: May, 1985.

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No. 84-1044

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

BRIEF *AMICUS CURIAE* ON BEHALF OF THE BELL ATLANTIC TELEPHONE COMPANIES

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OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

BRIEF *AMICUS CURIAE* ON BEHALF OF THE BELL ATLANTIC TELEPHONE COMPANIES

The Bell Atlantic telephone companies[1] submit this brief as *amicus curiae* in support of appellant Pacific Gas and Electric Company's ("PGandE") appeal from a final

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[1] The Bell Atlantic telephone companies, each of which is a wholly owned subsidiary of Bell Atlantic Corporation, are The Diamond State Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, and The Chesapeake and Potomac Telephone Company.

judgment of the Supreme Court of California denying PGandE's petition for a writ of review of a decision of the Public Utilities Commission of the State of California ("CPUC"). In its decision, the CPUC compelled PGandE to include in its monthly billing envelope, on eight occasions over a two-year period, inserts prepared by Toward Utility Rate Normalization ("TURN"), a private organization that purports to represent the interests of PGandE's residential ratepayers. PGandE appeals on the ground that the decision of the CPUC violates PGandE's rights of free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

INTEREST OF *AMICUS CURIAE*

The Bell Atlantic telephone companies are privately owned corporations providing telecommunications services to residential and business customers in Delaware, Maryland, New Jersey, Pennsylvania, Virginia, West Virginia, and the District of Columbia. In four of these states, legislatures are considering or have recently considered bills that would establish state-sponsored organizations similar to TURN and mandate that the message inserts of those organizations be placed in utility billing envelopes.[2] The District of Columbia City Council is considering similar legislation.[3] This Court's decision in the present case will determine the power of these jurisdictions to enact such legislation consistent with the First Amendment rights of the Bell Atlantic telephone companies.

In addition, the services provided by the Bell Atlantic telephone companies are subject to regulation by state and local public utilities commissions. This Court's

[2] A. 1460, A. 1468, S. 1244, 1984 Sess., New Jersey; H. 514, 1985 Sess., Pennsylvania; S. 392, 1984 Sess., Virginia; S. 226, 1985 Sess., West Virginia.

[3] No. 6-28, 1985 Sess., District of Columbia.

decision will determine the power of these public utilities commissions to provide organizations similar to TURN with compelled access to the billing envelopes of the Bell Atlantic telephone companies.

Each of the parties to this case has granted its written consent to the filing of this brief *amicus curiae*. The parties' written consents have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The decision of the CPUC mandating that PGandE include in its billing envelopes materials prepared by TURN infringes upon the First Amendment rights of PGandE in at least two respects. *First*, the CPUC's decision compels PGandE to become an instrumentality for disseminating the messages of TURN, a party selected by the CPUC on the basis of the content of TURN's messages. This compulsion violates PGandE's First Amendment right to refrain from participating in the speech of another. *Second*, the CPUC's decision restricts PGandE's ability to communicate freely with its ratepayers through its own monthly newsletter. Inclusion of the TURN insert will dilute the impact of the views presented by PGandE in its newsletter, and may also increase the cost to PGandE of communicating through the newsletter.

The CPUC's infringement of PGandE's First Amendment rights cannot be justified by the fact that PGandE is a public utility or by the argument that certain space in PGandE's billing envelope is the "property" of PGandE's ratepayers. Regulated utilities possess First Amendment rights, and the entire PGandE billing envelope is solely the property of PGandE. Moreover, even if certain space within the billing envelope were held not to be the property of PGandE, the CPUC's commandeering of the entire envelope to assure the dissemination of TURN's messages would be inconsistent with the guar-

antees of the First Amendment. Fundamental constitutional rights in any event should not turn on such abstruse inquiries as determining the property rights in the space in an envelope.

The CPUC's action cannot be justified as a narrowly tailored means of achieving a compelling state interest. The state interest advanced by the CPUC is not sufficiently compelling. Further, that interest could be achieved by means less restrictive of PGandE's First Amendment rights than the means chosen by the CPUC.

ARGUMENT

I. The Guarantees of the First Amendment Apply to Public Utilities Such as PGandE.

The First and Fourteenth Amendments to the United States Constitution guarantee that no State shall "abridg[e] the freedom of speech." In two recent cases, this Court established that governmental regulatory power over public utilities does not deprive such entities of First Amendment rights to freedom of speech. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566-68 (1980); *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 534 n.1 (1980).

II. The CPUC's Decision Granting TURN Access to PGandE's Billing Envelopes Infringes upon PGandE's First Amendment Rights.

A. The CPUC's Decision Compels PGandE to Participate in Disseminating the Messages of Another Party Selected by the CPUC.

The "right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977); *see Board of Education* v. *Barnette*, 319 U.S.

624, 633-34 (1943). *Wooley* established that, in the absence of a compelling state interest, the State of New Hampshire could not compel a New Hampshire automobile owner to display the state motto "Live Free or Die" on the license plate of his automobile. This Court based its decision in *Wooley* on the "First Amendment right to avoid becoming the courier for [the message of the State]." *Wooley*, 430 U.S. at 717.

The First Amendment freedom from compelled speech recognized in *Wooley* is fully applicable to this case. Like the automobile owner in *Wooley*, PGandE has been compelled by the CPUC to participate in disseminating the messages of another. Moreover, like the "Live Free or Die" motto at issue in *Wooley*, the messages that PGandE must include in its billing envelopes are not messages with which PGandE necessarily agrees.

In three respects, the facts in *Wooley* are arguably distinguishable from those of this case. None of these distinctions, however, renders *Wooley* inapplicable to the present case, because none of the distinctions negates the fundamental flaw in the CPUC's action—the compulsion of PGandE by a state agency to participate in the speech of another under circumstances in which PGandE may wish to refrain from speaking.

First, the CPUC's decision cannot be defended on the ground that the CPUC has refrained from prescribing the specific messages to be communicated in PGandE's billing envelopes. By selecting TURN as the party empowered to require PGandE to place inserts in the billing envelopes, the CPUC has prescribed the source of the messages to be disseminated. To support its choice of TURN, the CPUC stated that "[i]t is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E."[4] Thus, as the CPUC recognizes, its

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[4] *Toward Utility Rate Normalization* v. *Pacific Gas & Electric Co.*, Decision No. 83-12-047 (Cal. PUC Dec. 20, 1983) [hereinafter

decision is necessarily based upon a judgment concerning the content of the messages to be communicated by TURN. This Court has established that such content-based discrimination among purveyors of ideas is inconsistent with the guarantees of the First Amendment. *See Police Department* v. *Mosley*, 408 U.S. 92 (1972).[5]

Second, it is of no First Amendment significance that the "Live Free or Die" motto in *Wooley* was physically imposed on the property of New Hampshire residents whereas the TURN message is inserted in PGandE's billing envelope. The fundamental concern in *Wooley* was not the manner in which the New Hampshire residents' property was used, nor even the fact that private property was in some sense appropriated. Rather, *Wooley* stands for the proposition that no one may be compelled to participate in disseminating the messages of another. That proposition is fully applicable to the CPUC's compulsion of PGandE.

Finally, the fact that the TURN inserts must identify their source and state that their content has not been endorsed by PGandE does not serve to distinguish

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"Dec. No. 83-12-047"], *reprinted in* Appendix to the Jurisdictional Statement of Appellant Pacific Gas and Electric Company [hereinafter "J.S. App."] at A-1, A-17, *Pacific Gas & Electric Co.* v. *Public Utilities Commission of the State of California*, No. 84-1044 (U.S. Dec. 28, 1984), *modified*, Decision No. 84-05-039 (Cal. PUC May 2, 1984), *reprinted in* J.S. App. at A-45.

[5] The CPUC's content-based discrimination distinguishes the present case from *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), in which access to private property for the purpose of expressing views was provided in a content-neutral manner. Moreover, interest groups other than TURN are likely to conclude that ratepayers would benefit from exposure to their views as well. If a number of these groups seek access to the billing envelopes of PGandE and other utilities, the CPUC's decision, combined with the limited size of utility billing envelopes, may well produce further content-based discrimination among purveyors of ideas.

Wooley. Such a disclaimer of PGandE sponsorship in no way diminishes the fact that PGandE has been compelled by state action to disseminate the messages of TURN. The disclaimer merely removes the false inference that recipients of the billing envelope might otherwise draw that PGandE is the source of TURN's messages or necessarily agrees with them. It was not confusion over the source of the message that rendered the state law requirement invalid in *Wooley*—it was the fact that the state forced the individual "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715.[6]

B. The CPUC's Decision Limits PGandE's Ability to Communicate with Its Ratepayers.

The CPUC's decision granting TURN compelled access to PGandE's monthly billing envelopes also infringes upon PGandE's First Amendment right to communicate with its ratepayers. For more than sixty years, PGandE has included in its billing envelope *PGandE Progress* (*"Progress"*), a monthly newsletter in which PGandE explains rate changes, disseminates information concerning energy conservation, and provides responses to consumer inquiries.[7] Inclusion of the TURN insert in PGandE's billing envelope will dilute the impact of the messages that PGandE conveys through *Progress*. This effect will be particularly significant if, as is likely, TURN advocates positions inconsistent with the views of PGandE.

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[6] The Court in *Wooley* relied on, among other authorities, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), which held unconstitutional a Florida statute placing an affirmative duty on newspapers to publish the replies of political candidates whom they had criticized. It cannot be seriously suggested that this statute would have passed constitutional muster if it had gone on to provide that the replies in question must contain a disclaimer of endorsement by the newspaper compelled to carry the reply.

[7] The cost of printing *Progress* is borne entirely by PGandE's stockholders.

Further, the TURN insert, the weight of which is within the sole control of TURN, will fill some or all of the space that PGandE has historically used to communicate through *Progress*. If PGandE wishes to distribute *Progress* in a month in which the TURN insert is mandated, PGandE must pay any additional postage necessitated by the inclusion of *Progress*.[8] Such restrictions on PGandE's ability to communicate freely with its ratepayers on issues of concern to the utility and its customers patently infringe upon PGandE's First Amendment rights. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566-68 (1980); *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 533-35 (1980).

III. The CPUC's Infringement of PGandE's First Amendment Rights Cannot Be Justified by the Argument That the "Extra Space" in PGandE's Billing Envelopes "Belongs" to PGandE's Ratepayers Rather Than to PGandE.

The CPUC attempts to justify its infringement of PGandE's First Amendment rights by the argument that the "extra space" in PGandE's billing envelopes—*i.e.*, "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost"[9]—is the "property" of PGandE's ratepayers rather than that of the utility. This conclusion rests on a flawed and illusory analysis, and is inconsistent with established doctrine of this Court. Moreover, even if the "extra space" in PGandE's billing envelopes were properly considered to be the "property" of the utility's ratepayers, the CPUC's decision would nevertheless constitute a violation of PGandE's First Amendment rights.

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[8] Dec. No. 83-12-047, *reprinted in* J.S. App. at A-1, A-32 to A-33.

[9] Dec. No. 83-12-047, *reprinted in* J.S. App. at A-1, A-3.

A. The Entire PGandE Billing Envelope Is the Property of PGandE.

The CPUC does not, and cannot, dispute that the PGandE billing envelope is the property of PGandE. Faced with this obstacle, the CPUC resorts to a fiction that it terms "extra space," a creation deriving solely from the coincidental fact that postal service may be purchased only in one-ounce increments. The CPUC regards this "extra space" as separable from the billing envelope and the postage affixed to the envelope, both of which are paid for with PGandE's funds. Having first created this fiction, the CPUC then gratuitously awards a property interest in the "extra space" to PGandE's ratepayers. This reasoning is both illogical and flatly inconsistent with the decisions of this Court.

There is no "extra space" in the PGandE billing envelope that is not the property of PGandE, and the fact that PGandE is a regulated entity does not alter this conclusion. It has long been clear that governmental regulation of privately owned utility companies does not transform those companies into public instrumentalities. And in *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23 (1926), this Court established the fundamental principle that utility ratepayers do not acquire any ownership interest in the private property of the utility that is used to provide them with services:

> "Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company."

Id. at 32.

This Court reaffirmed the foregoing principle in the First Amendment context in *Consolidated Edison Co.* v.

Public Service Commission, 447 U.S. 530 (1980). *Consolidated Edison* established that bill inserts prepared by a public utility constitute use of the utility's "own billing envelopes to promulgate its views on controversial issues of public policy." *Id.* at 540. Rejecting the argument that "the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control," this Court stated that "the [New York Public Service] Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property." *Id.* In light of the *New York Telephone* and *Consolidated Edison* cases, the CPUC's infringement of PGandE's First Amendment rights cannot be justified by the argument that certain space within the PGandE billing envelope is not the property of PGandE.

Moreover, the mere fact that PGandE could accommodate the TURN insert in its billing envelope at no additional marginal cost does not create any property interest of the sort that the CPUC has assigned to PGandE's ratepayers. A simple analogy renders apparent the fallacy in the CPUC's reasoning. Utilities own and operate automobiles or other service vehicles. At certain times when PGandE vehicles are in use, they likely are occupied by only one PGandE employee. The CPUC's decision suggests that the "extra space" within a one-occupant vehicle that could be filled at no additional marginal cost would thus became the "property" of PGandE's ratepayers. Indeed, taken to its logical conclusion, the CPUC's reasoning would suggest that any component of PGandE's property—including office buildings and other real estate—that could be used by a third party at no additional marginal cost would become, by virtue of that fact alone, the "property" of the utility's ratepayers. Such a result, in addition to being wholly inconsistent with *New York Telephone* and *Consolidated Edison*, would wreak havoc upon the operational

flexibility necessary for a utility to provide high-quality service to its customers.

B. Even If the "Extra Space" in PGandE's Billing Envelopes Were Properly Considered to Be the "Property" of PGandE's Ratepayers, the Decision of the CPUC Would Violate PGandE's First Amendment Rights.

Even if some portion of PGandE's billing envelope were appropriately denominated the "property" of PGandE's ratepayers, the CPUC's decision compelling PGandE to afford access to its billing envelope would still infringe upon PGandE's First Amendment rights. The "extra space" concocted by the CPUC does not exist in some disembodied universe. Rather, it exists only within PGandE's billing envelope, which the CPUC has acknowledged to be the property of PGandE. Accordingly, regardless of the ownership interest assigned to any supposed "extra space" within the envelope, the CPUC has commandeered the use of PGandE's property—the billing envelope itself—in the compelled dissemination of the messages of a third party.

Further, any attempt to draw fine, metaphysical distinctions that would make fundamental constitutional rights turn on the ownership interests in the space within an envelope is beside the point and futile. As noted above, the overarching concern in *Wooley* v. *Maynard* was not that private property had been appropriated to disseminate the messages of the State. Rather, the concern was with the compulsion of New Hampshire residents to become unwilling participants in delivering the messages of another in the course of their unavoidable, everyday activities. Thus, the state statute at issue in *Wooley* "force[d] an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715. In this case, PGandE has been

required—as part of its routine, unavoidable billing activity—to become the instrument for disseminating messages with which it may not agree. Irrespective of any consideration of property rights, such compulsion violates the freedom to refrain from speaking that the First Amendment guarantees.[10]

IV. The CPUC's Decision Cannot Be Upheld as a Precisely Drawn Means of Serving a Compelling State Interest.

Any governmental regulation of speech that is based on content may be upheld only if it is found to be "a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co.*, 447 U.S. at 540. In this case, the CPUC's infringement of PGandE's First Amendment rights fails to satisfy either aspect of the test set forth in *Consolidated Edison.* The state interest cited by the CPUC is insufficiently compelling in light of the First Amendment decisions of this Court. Moreover, even if the state interest cited by the CPUC were sufficiently compelling, the CPUC had available other means more precisely tailored to achieving that interest.

A. The State Interest Cited by the CPUC Is Not Sufficiently Compelling.

The CPUC identified the state interest supposedly furthered by its decision as "the assurance of the fullest consumer participation in CPUC proceedings and the

[10] Relying on the fundamental right to be free from the compulsion to speak, the New York State Supreme Court recently held that an attempt by the New York Public Service Commission to compel public utilities to open their billing envelopes to inserts prepared by various consumer groups violated the First Amendment and state constitutional rights of the utilities. *See Consolidated Edison Co.* v. *Public Service Commission*, No. 10762-84, slip op. at 5-9 (N.Y. Sup. Ct., Albany County, Apr. 10, 1985). The result reached by the New York court is appropriate in this case as well.

most complete understanding possible of energy-related issues." [11] The conclusion that this state interest justifies the CPUC's infringement of PGandE's free speech rights is at odds with established First Amendment doctrine. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), this Court established that a desire to provide "equal access" for competing views cannot override a party's First Amendment interest in being free from the compulsion to disseminate the messages of others. This principle was explicitly reaffirmed in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), which established that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49. In light of these decisions, the CPUC's attempt to enhance the speech of TURN by restricting the First Amendment rights of PGandE cannot be upheld.

B. Alternatives Less Restrictive of PGandE's First Amendment Rights Were Available to the CPUC.

Even the most compelling state interest cannot justify the infringement of fundamental First Amendment rights unless that interest is achieved by the means least restrictive of the rights violated. As this Court has recognized, even if "the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

The state interest cited by the CPUC—"the assurance of the fullest consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues"—could be achieved readily and effectively by means less restrictive of PGandE's First Amendment rights than the means selected. In-

[11] Dec. No. 83-12-047, *reprinted in* J.S. App. at A-1, A-22.

deed, this interest could be achieved by means that would not restrict PGandE's First Amendment rights at all. For example, both enhanced consumer participation in CPUC proceedings and public understanding of energy-related issues could be promoted by direct dissemination of information to consumers by the CPUC or other state agencies. Thus, even if the state interest cited by the CPUC were "compelling," the means chosen to achieve that interest render the CPUC's action in violation of the First Amendment.

CONCLUSION

For the reasons set forth above, the decision of the Supreme Court of California should be reversed.

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IN THE

Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *ET AL.*,

Appellees.

On Appeal From the Supreme Court of California

BRIEF OF AMERICAN GAS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

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BRIEF OF AMERICAN GAS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

The American Gas Association (A.G.A.) submits this brief *amicus curiae* in support of the Pacific Gas and Electric Company (appellant).[1]

INTEREST OF THE *AMICUS CURIAE*

The American Gas Association (A.G.A.) is a national association representing the interests of approximately 300 member companies involved in the distribution and transmission of natural gas throughout the 50 states. These companies account for approximately 85 percent of all domestic utility sales of natural gas to consumers. The Appellant, Pacific Gas and Electric Company (PGandE), is a member of the A.G.A.

[1] Written permission from the parties to this litigation to file this brief as *amicus curiae* has been obtained and has been filed with Clerk of this Court.

The California Public Utilities Commission (commission) has ordered that messages and solicitations for money of a private organization, Toward Utility Rate Normalization ("TURN"), must be included in four of PGandE's twelve monthly billing envelopes for a period of two years. Without discussion, the Supreme Court of the State of California denied review of this commission ruling.

The commission's order is of vital importance to most members of A.G.A. The order strikes at fundamental constitutional rights of privately owned utilities. The order is predicated upon interpretations of the scope of regulatory power over private property which have never before received judicial approval. Most seriously, it requires utilities to be associated with the communications of others and speak when they prefer to remain silent. It limits the ability of regulated utilities to communicate on issues important to those companies and their customers. It also nullifies the right of utilities to own and control certain of its property.

The concepts embodied in the commission's order have been adopted or are being promoted in other states.[2] Because

[2]The concept of government-mandated access to utility billing envelopes has recently prompted similar government action in the following states. Two state legislatures have authorized access to billing envelopes by Citizens Utility Boards (CUBs): *Wisconsin*, Wis. Stat. Ann. §199.10 (West 1984); *Illinois*, Ill. Ann. Stat. ch. 111 2/3, § 909 (Smith-Hurd 1984). On November 6, 1984, *Oregon* voters approved an initiative petition that requires utilities to include six CUB mailings over an unspecified period of time in their billing envelopes. J.S. App. 142-50. Bills were recently introduced in *Massachusetts*, H. 5756, 1984 Sess., and the *District of Columbia*, No. 5-546, 1984 Sess., to establish CUBs and permit access to billing envelopes. Citizens groups in *Nevada*, In re Investigation of Commission Jurisdiction over Extra Space in Utility Billing Envelopes, Docket No. 84-1129 (Nev. P.S.C. Jan. 7, 1985), and *Montana*, In re Joint Petition of Montana Citizen's Utility Board for Declaratory Ruling and Rulemaking, Order No. 5107 (Montana P.S.C. Dec. 24, 1984), have petitioned their respective commissions for access.

Note that the *New York* Public Service Commission in its Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes, No. 28655 (May 14, 1984),

of these threats to the fundamental First and Fifth Amendment rights of utilities, A.G.A. is filing this *amicus curiae* brief in support of PGandE.

SUMMARY OF ARGUMENT

This is a case of first impression. It presents a violation of the First Amendment guarantees of free speech and association and a violation of the Fifth Amendment guarantees of management prerogative rights and against the taking of property without compensation.

The commission identified specific public policy goals, (the assurance of full consumer participation in commission proceedings and a more complete understanding of energy-related issues); found them to be sufficiently compelling to justify limitations on First Amendment rights; ruled, in the absence of legal precedent and principled analysis, that a portion of the space in PGandE's billing envelope is the property of all PGandE's customers; and required that PGandE's billing envelope carry the messages and requests for money of a third party.[3]

By compelling PGandE to use its billing envelope to disseminate a third party's views and requests for money, the commission has violated the company's First and Fifth amendment rights.[4] The regulatory power over privately owned businesses,

ordered access to billing envelopes by consumer representatives. On appeal to the New York Supreme Court, Albany County, the court found such order violated the First Amendment. *Consolidated Edison Company* v. *Public Service Commission of New York*, No. 10762/84 (April 10, 1985). Litigation concerning a state commission's authority to compel third-party access to utility billing envelopes is pending in: *West Virginia-Citizen Action Group* v. *Public Service Commission of West Virginia*, No. 16512 (S. Ct. App. W.Va. filed July 19, 1984).

[3]These public policy goals may be laudable, but A.G.A. believes that they are obtainable by other means not violating constitutional guarantees.

[4]While the Jurisdictional Statement formally presented only the First Amendment issue, there is no limitation on this Court's plenary powers to inquire into reasonably related issues, or to correct plain error.

even if affected with a public interest, cannot be so construed as to override appellant's constitutional rights.

ARGUMENT

I.

THE FIRST AMENDMENT RIGHTS OF APPELLANT HAVE BEEN ABRIDGED IN THREE IDENTIFIABLE WAYS

A. PGandE's Ability to Communicate Has Been Damaged

It is settled law that PGandE is entitled to freedom of speech. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). It is equally clear that PGandE's ability to use its billing envelope to protect and nurture the commercial relationship with its customers has been frustrated by the commission's order. Four time per year, for two years, PGandE's billing envelope will be used to carry the messages of a third-party, TURN.

The billing envelope is the fundamental means selected by PGandE to collect accounts receivable and to communicate with customers. PGandE has traditionally distributed its monthly newsletter, *Progress*, through its billing envelope. Under the challenged order, third party messages may preempt PGandE's own messages to customers. The commission order substantially dilutes the speech capabilities of PGandE.

Utilities are faced with intense competition from providers of other forms of fuel. Thus, they have a substantial interest in

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Supreme Court Rule 34(.1) (a). Appellant's jurisdictional statement, at pp. 20-22, raises issues common to the resolution of both First and Fifth Amendment questions. Appellant questions whether the extra space in monthly billing envelopes is utility property and whether the Commission may compel PGandE to carry in its property the messages of a third party. A.G.A. submits and argues that because resolution of these issues under one Amendment is integrally related to resolution under the other, this is an appropriate case for the Court to consider a question not directly presented in the jurisdictional statement.

making efforts to communicate with their customers. Utilities must preserve and strengthen the voluntary commitment current and potential customers have for the service provided by the utility.[5]

The utility also becomes a known source of information and a recognized voice expressing specific views. Periodically, the envelope must contain legally required notices on such topics as proposed rate increases, service changes, safety information and conservation suggestions.

The billing envelope has become an important, identifiable piece of property used by PGandE to keep the commercial relationship of buyer and seller alive. The direct effect of the commission order at issue is to undermine that commercial relationship.

The utility's envelope has been commandeered to carry third party messages. As the Court observed in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 254 (1974), governmental coercion of an enforceable right of access to the means of speech publication "at once brings about a confrontation with the express provisions of the First Amendment . . . ."[6]

It may be argued that the utility can simply pay extra postage and include its newsletter along with the third-party messages. Merely paying extra postage to include PGandE messages with those of TURN does not avoid injury to PGandE. When PGandE's message is included with the message of another party, it is a fundamentally different message than when it is sent by itself. Including the messages of a third party with those of PGandE unalterably changes and limits PGandE's message.

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[5] "Monopoly over the supply of product provides no protection from competition with substitutes for that product." *Central Hudson Gas and Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 567 (1980).

[6] As also noted by the Court in *Miami Herald* v. *Tornillo*, 418 U.S. at 257, government enforced right of access inescapably "dampens the vigor and limits the variety of public debate," citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 276 (1964).

B. PGandE's Right to Remain Free From Forced Association With the Communications of Third-Parties and to Refrain From Speaking When It Prefers to Remain Silent Has Been Violated

An essential protection afforded by the First Amendment is the right to refrain from speaking or associating with the views of others. *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). The practical effect of the commission's order is to compel both speech and an unwanted association.

The regular presence of TURN messages in PGandE's billing envelope can only cause recipients to associate the material with PGandE. This is an unwanted association because TURN messages are likely to express views contrary to those of PGandE. It is reasonable to assume that customers will not separate TURN's message from that of its courier, PGandE. The natural result is that customers will impute PGandE's concurrence and support of TURN's messages. At best, confusion is thrust upon the customer; at worst, the views of PGandE are misrepresented.

Acrimonious debate sometimes occurs between a utility and those adversaries purporting to represent the interests of some of its customers. For example, natural gas utilities typically take a longer-range view of what is a prudent investment or operating cost than those consumer advocates who seek immediate cost reductions. Placing messages critical of a utility business decision in the company's billing envelope exerts pressure on the utility to respond and answer what it considers misleading statements or ill-advised policy. This Court's decisions make it clear that no such pressure is constitutionally acceptable. A state's interest in promoting particular concepts "cannot outweigh an individual's First Amendment right to avoid becoming the courier for messages with which he disagrees." *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977).

This Court has recognized that free speech includes not only the right to speak one's mind, but also the right to refrain from speaking. *Wooley* v. *Maynard*, 430 U.S. 705; *Miami Herald Publishing Company* v. *Tornillo*, 418 U.S. 241.

In *Wooley* v. *Maynard*, the Court considered an analagous situation to the one presented here. The State of New Hampshire tried to force a driver to display the state's motto, "Live Free or Die", on his automobile license plate. The driver objected and argued that under the First Amendment he could not be compelled to carry someone else's message. In striking down the state requirement, the Court explained that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Id.* at 714. The right to remain silent is just as fundamental to a free society as the right to speak one's mind.

The forced communications at issue here may be even more serious than that found unconstitutional in *Wooley* v. *Maynard*. PGandE can be required to disseminate the comprehensive, ideological discussions of a third-party group to millions of its customers. This is certainly more egregious than the limited message found offensive in *Wooley*. As recognized in a recent state court decision, compelled dissemination through the billing envelope presents "an ominous threat" to the First Amendment. *Consolidated Edison* v. *Public Service Commission*. No. 10762/84 (N.Y. Sup. Ct., Albany County, decided April 10, 1985).

C. The Commission Has Asserted the Right to Limit and Evaluate PGandE's Speech

The commission limitation upon the utility's right to engage in speech is constitutionally infirm. The order is based on the commission's view that the content of PGandE's speech is inadequate. The "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976).

The commission found a compelling state interest for regulating speech, based upon a perceived need to upgrade the content of public debate on commission-related matters. The commission stated that "[i]t is reasonable to assume that

the ratepayers will benefit *more* from exposure to a variety of views than they will from only that of PGandE." Dec. No. 83-12-047, slip op. at 17; J.S. App. 17 (emphasis added). The content of PGandE's speech was deemed insufficient by the commission to provide the benefit to customers required by an efficient use of the extra space.

Commission interference with communications sent to PGandE's customers is not justified under any of the tests that allow the state to regulate speech. The tests as set forth in *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530, 535 (1980) only allow state regulation under the following, limited circumstances: (1) reasonable time, place or manner restrictions, (2) permissible subject matter regulation, or (3) if it is a narrowly tailored means of serving a compelling state interest.

The commission concluded that granting access to appellant's billing envelope was a permissible time, place or manner regulation. Dec. No. 83-12-047, J.S. App. pp. 20-23. The Court in *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530, 536, has made it clear, however, that such restrictions "may not be based either upon the content or subject matter of speech." The commission decision at issue is content based for in fact it promotes the dissemination of a particular ratepayer view. State restrictions on speech, imposed for the purpose of advancing the communication of particular information, cannot be justified as a content-neutral time, place or manner regulation.

The commission ordered the invasion of PGandE's property to advance its interest in increasing customer awareness of commission proceedings. It described its orders as making "more efficient use" of the "extra space" in the envelope. Dec. No. 83-12-047, slip op. at 28; J.S. App. 28. In effect, the commission usurped PGandE's right of speech for a perceived benefit to others. The company's messages were preempted because the commission deemed them inadequate or inefficient. This was done without any way of knowing whether the messages of TURN would actually add to customer awareness.

Subject matter regulation is only permissible under very limited circumstances. Such regulation usually involves speech which is obscene or otherwise blatantly offensive. No one has contended that subject matter regulation would be appropriate in this case.

Increasing customer knowledge of issues pending before the commission may be a worthy goal, but it is neither a compelling interest nor is it carried out through narrowly tailored means. There are many ways of providing information to consumers without implicating fundamental freedoms. The interests which the commission seeks to promote could be better served by direct funding of intervenor groups, attorney and expert witness fee awards, increased educational activities or through a variety of other means. None of these avenues involve a limitation of PGandE's constitutional rights. Nor do they involve the regulatory process in a morass of endless deliberations over which groups and which messages are worthy of inclusion in billing envelopes.

This Court should find the limitation and evaluation of PGandE's speech to constitute an unconstitutional deprivation of First Amendment rights. As noted, several states are utilizing the rationale approved in California to evaluate utility speech. Thus, the ruling in this case will clearly have a substantial impact on utilities across the country.

What is required is a categorical rule that private-party access is constitutionally infirm. As one writer has observed:

> "Categorical rules thus tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties. The balancing approach is contrastingly a slippery slope; once an issue is seen as a matter of degree, first amendment protections become especially reliant on the sympathetic administration of the law."[7]

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[7] L. Tribe, American Constitutional Law 584 (1978).

II.

THE COMMISSION'S ORDER TAKES PRIVATE PROPERTY WITHOUT JUST COMPENSATION

The commission has argued that because customers of PGandE pay for the extra space in the billing envelope, the extra space should be "properly considered as ratepayer's property." Dec. No. 93887; J.S. App. 72. As such it is allegedly controlled by the government of the state. Commission's M.D., at 7. To the contrary, established law makes it clear that the billing envelope is PGandE's private property. The commission's invasion of PGandE's billing envelope amounts to an unlawful taking of that private property.

A. Utility Property Is Owned By the Utility and Not By Its Customers

The basic principle, now threatened by the Commission's order, is that title to utility property vests in the utility. The fact that the property is devoted to public service, and that its costs are considered in setting rates, does not alter the private character of utility property. *United Railways and Electric Company of Baltimore* v. *West*, 280 U.S. 234, 249 (1980).

This case necessarily implicates the constitutionality of a state regulatory body exercising enabling legislation to transfer property rights from private owners to a special interest group.[8] The "extra space" in PGandE's billing envelope was, prior to the Commission's order, understood and treated by all interested parties as an integral part of PGandE's property. The spectre of regulatory commissions using their public-protection powers to grant positive interests in utility property

[8]This case does not involve a challenge to the power of eminent domain. Utility property may be taken for public use when just compensation is paid. In considering the application of the Fourteenth Amendment to cases of expropriation of private party, the question of what is a public use is a judicial one. *Cincinnati* v. *Vester*, 281 U.S. 439, 444 (1930).

to third-party groups has never been permitted by this Court in the past.[9]

In a long line of cases, this Court has consistently held that persons purchasing service from state-regulated utilities obtain no cognizable interests in the property purchased and used by the utility in providing that service. *Smyth* v. *Ames*, 169 U.S. 466 (1898); *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23 (1926). This fundamental rule of law is an indispensable element in the system of privately-owned public utility companies.

Utility management has the right and responsibility to conduct the business affairs of the utility. Regulatory agencies are neither empowered to make day-to-day business decisions nor to manage the operations of the utility business. As this Court noted in *Missouri ex rel. Southwestern Bell Telephone Company* v. *Public Service Commission of Missouri*, 262 U.S. 276, 289 (1923):

> It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of the public utility companies, and is not clothed with the general powers of management incident to ownership.

B. PGandE's Property Was Unlawfully Taken

Property is "taken" when the owner is made unable to

[9]It should be noted that TURN, or any other interest group, cannot be considered "the public". Even if TURN represented all customers of PGandE (which it does not), such class of persons would not constitute "the public". For example, *Black's Law Dictionary* 1393 (4th ed. 1968), defines "public," in pertinent part: "Pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; general; open to common use. [Omitting citations.] Belonging to the people at large; relating to or affecting the whole people of a state, nation, or community; not limited or restricted to any particular class of the community. [Omitting citations.]"

use that property as the owner wishes and to exclude others from the property. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). The Constitution protects "every sort of [property] interest the citizen may possess." *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945).

In direct confrontation with legal precedent and sound public policy, the commission has defined new property rights and assigned them to a specific organization purporting to represent some consumers.[10] It has ruled that any unused space remaining in the utility's billing envelope (after the bill and any legally mandated notices are included) belongs to PGandE customers.[11] The envelope itself, according to the commission, remains the property of the utility. To separate any facet of the ownership interest and transfer it to the ratepayers, as a consequence of paying rates, would defeat the utility's ownership interest and violate the principle that ratepayers pay for utility service, not for the property used to provide that service.

If the commission decision is allowed to stand, commissions will be free to declare that any property used by a utility to provide service belongs to the state or to an undefined "public". This could include anything which is found to have 'unrealized economic value'. As one dissenting member of the commission rhetorically asked, "what are the consequences beyond the circumstances presented in this case? The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle . . . have excess space and 'economic advertising value'." Dec. No. 83-12-047, slip op.

[10] PGandE's large body of customers may have conflicting interests. The interests of large industrial and commercial users are frequently in direct conflict with those of the small residential user. Also, in a large utility system the interests of users located in concentrated urban areas may vary from those in rural areas.

[11] The Commission vaguely described the interest of the customers as an "equity" right. Note that little indication is given of what that term means. Dec. No. 83-12-047, slip op. at 4; J.S. App. 4.

at 40. (Bagley dissenting) J.S. App. 40. Despite references to "extra space" in the billing envelope, the direct effect of the commission order is that the billing envelope is itself taken and made to carry the messages of a third-party.[12]

It is irrational to separate, for purposes of establishing and enforcing legal rights, a physical object (to which property rights admittedly attach) from one of its characteristics. "Extra space" is merely an elliptical manner of referring to one of the characteristics of the billing envelope. An envelope can carry. This is why it has financial value, and why the utility purchased it. The concept of "extra space" is a function of a quirk in postal rates and regulations. Such space could not exist if postal regulations were modified. Long-standing Fifth Amendment construction precludes the Commission from granting a specific interest group a property right of any kind in utility property.

[12] "The power to exclude has traditionally been considered one of the most treasured strands to an owner's bundle of rights." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California upholding the decision of the California Public Utilities Commission, which is inconsistent with the First and Fifth Amendments to the United States Constitution, should be reversed; and the commission's decision should be vacated.

Respectfully submitted,

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NO. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

V.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

The Legal Foundation of America is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in Internal Revenue regulations. Its goals, among others, include the preservation of the market system as a means of resource allocation, the attainment of a better federal-state balance, and the improvement of the system of criminal justice. In addition, LFA has appeared in many cases involving first amendment issues.

LFA is located on the campus of, and shares certain personnel and activities with, the South Texas College of Law in Houston. All litigation undertaken by LFA is approved by its Board of Trustees, which is composed of attorneys, academics and businesspeople.

PRELIMINARY STATEMENT

It is expected that PG&E's briefing will thoroughly address the governing case law, including the proper application of the first amendment, the requirement of a compelling state interest, the requirement that regulation conform to the least onerous alternative, the right not to speak, PG&E's right to use its own property, and other issues. Amicus curiae generally agrees with these arguments. However, because amicus curiae wishes to avoid unnecessary duplication, this brief concentrates upon other issues, including policy arguments.

SUMMARY OF ARGUMENT

I.

Content-Based Regulation of Expression. The PUC's approach necessarily regulates speech on the basis of its content. Its decision that TURN's message is "appropriate" and is an "efficient" use of the envelope could only have been reached on the basis of its content. Further, if the Commission is to attain its stated goal of exposing ratepayers to a variety of views, it will be immersed in choosing on the basis of message content between numerous competing groups interested in nuclear power, cogeneration, alternative fuels, rate design, problems of the elderly, small business electric rates, problems of the poor, and other concerns as valid as those favored by TURN. In the process, the Commission will serve as an "editor" or "gatekeeper" of speech, inconsistently with this Court's decisions, and it will discourage speech by PG&E resulting from the use of its own envelope. Speech by utilities is itself valuable, and utilities have contributed significantly to debate about energy and conservation issues. Ironically, the PUC's action ensures that speech from utilities nationwide will be more bland, less responsive to controversy, and less useful than ever before.

II.

"Monopoly" and Regulatory Arguments Insufficient. The "wasted" space or "extra" space rationale does not support the Commission's decision. By exactly the same reasoning, the PUC could grant TURN the right to use empty PG&E offices, unused secretarial time, and advertisements on the sides of PG&E panel trucks. Furthermore, it is meaningless to support the decision by "property" rationales, because PG&E is here denied the use of its own property, and the result is that an asserted property "interest" held by millions of ratepayers as tenants in common is simply given to the use of one entity with which many ratepayers will vehemently disagree. Finally, while PG&E's natural monopoly in gas and electricity justifies regulation of its delivery of those commodities, PG&E does not have a monopoly, or anything approaching a monopoly, upon the media of communication. This "monopoly" rationale comes dangerously close to an endorsement of the regulation of metropolitan newspapers, which many have described as monopolistic. Actually, TURN can reach anyone interested in its message by telephone, mail, or other media, and customers have television, radio, cable, print and other media available to them in abundance. What TURN really seeks is a captive audience that must open the envelope, so that it can have a competitive advantage over other charities in fundraising. This interest is not a legally cognizable one, and the decisions of this Court countermand the asserted monopoly rationale.

I. THE COMMISSION'S APPROACH REGULATES SPEECH ON THE BASIS OF ITS CONTENT.

The Commission has here determined that granting TURN the use of PG&E's billing envelope "would be an appropriate and efficient use of the extra space."[1] In making this decision, the Commission must have evaluated the speech at issue on the

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1 Appendix at A-16.

basis of its content. It could not have decided that TURN's message was "appropriate" or that it would be an "efficient" use of the space without evaluating the content of the message or its effect on the intended audience. [1a]

The Commission has also indicated that it seeks to expose ratepayers to a "variety of views," [2] and it has indicated that it will consider further applicants. Again, it will necessarily decide among applicants on the basis of the content of their messages.

A. *The Commission's Approach Necessarily Requires it to Choose Among a Wide Variety of Competing Groups with Conflicting Points of View.*

PG&E's ratepayers are not a monolith, and they obviously include many whose views are not represented by TURN. For example, there undoubtedly are many who vehemently object to nuclear generation of electricity.[3] Many of these anti-nuclear ratepayers would desire to close the Diablo Canyon nuclear generating station, even though it is already constructed and its closure would increase rates. These individuals' views would conflict sharply with those of groups seeking rates as cheap as possible, presumably including groups such as TURN. Therefore, to accommodate these differing viewpoints, the Commission should logically extend to the Sierra Club, the Friends of the Earth, or the Natural Resources Defense Council the same privilege it has extended to TURN in this case.

If, however, the Commission were to permit anti-nuclear groups to disseminate literature through PG&E's billing envelope, it must logically permit use of the envelope by citizens' groups *supporting* nuclear generation. The Atomic Energy Forum thus might apply for and be granted the use of PG&E's envelope. Nor does the logic of the PUC's position allow it to stop there. The Commission would just as logically need to open the envelope to a wide variety of other groups with competing concerns, among whom it would be required to choose on the basis of message content.

For example, many groups believe that more use of cogeneration will lower rates. Others, however, believe that cogeneration primarily benefits those who are able to set up their own cogeneration facilities while increasing rates for other ratepayers. [4] Accordingly, the Commission's logic means that it should force PG&E to carry literature from groups on various sides of the cogeneration controversy, particularly if it is to provide ratepayers with "exposure to a variety of views."

Even more groups would have antagonistic views on rate design. As the Commission has pointed out, TURN sometimes favors certain groups of consumers at the expense of other groups of consumers in its rate design arguments.[5] Such conflicts are inherent in rate design. Thus elderly ratepayers, perhaps represented by a group such as the American Association

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1a Indeed, the Commission quite clearly seeks to advance one side of the issue. It has favored a group that will argue for reduction of current rates for certain ratepayers, at the expense of the competing concerns enumerated here.

2 Appendix at A-17.

3 Some such opposition is based upon environmental or safety grounds; there is controversy concerning whether nuclear generation will cost less or cost more. Whichever view TURN takes of this issue will thus conflict with the positions of substantial numbers of ratepayers and will affect the rates they pay. See Pacific Gas & Elec. Co. v. California Energy Conservation & Devel. Comm'n, 461 U.S. 190 (1983).

4 The depth of this controversy, which clearly affects daily rates paid by TURN's constituency, can be appreciated by consideration of this Court's decision in FERC v. Mississippi, 456 U.S. 742 (1982). The Court split five to four, after having received dozens of amicus curiae briefs from entities on all sides of the cogeneration issue.

5 Appendix at A-15.

of Retired Persons, should obtain envelope space to advance their concerns. [6] Local chambers of commerce or small business coalitions, which represent business energy users that are disadvantaged by "two-tiered" rates preferring certain consumers and placing the resultant increased costs upon businesses, should be permitted to respond.[7] Furthermore, since the poor as a class are not identical to the elderly and could be disadvantaged by adoption of their agenda, the Welfare Rights Organization should be permitted to oppose the views of TURN (as well as opposing those of the AARP and small businesses).[8]

Groups supporting time-of-day or marginal-cost pricing,[9] as well as groups supporting or opposing "lifeline" rates[10] and

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6 Retired persons, for example, might benefit more from lifeline rates than most other groups, including the poor. See infra note 10.

7 These groups would be "pro-consumer" in that higher electric rates for businesses mean lesser productivity and hence fewer jobs for consumers. Economically, two-tiered rate design is open to criticism as a misallocation of resources. TURN could not be expected to represent this viewpoint and indeed would be likely vigorously to oppose it.

8 See infra note 10.

9 Marginal-cost pricing consists of higher prices at peak periods, when generating capacity is used to the point of inefficiency and electricity costs more than at other times of the day. This rate design would benefit persons who can shift their energy use, such as some homeowners. It would disadvantage businesses, persons dependent on daily air conditioning or heat, and persons seeking jobs.

10 "Lifeline" rate design prices the first units of electricity, up to the amount necessary for a small household, less than greater amounts. Large lifeline rates can be criticized as economically inefficient, because (for example) they would result in subsidy to a wealthy individual living in a condominium. Such rates might be most beneficial to elderly ratepayers. Persons below the poverty line, however, could be given significantly greater assistance by a means-tested program. Many groups of middle-income consumers, businesses, their customers, and persons seeking jobs, might be disadvantaged by certain lifeline rate designs. Again, TURN opposes the interest of many ratepayers no matter which position it takes.

supporting or opposing automatic cost-of-service adjustments,[11] would all have still other agendas, each of which would benefit certain classes of consumers at the expense of others. Indeed, citizens having different views of appropriate use of boiler fuels may have an even greater impact on rates than TURN could hope for; for example, it has been estimated that certain regulatory reforms in the use of natural gas could prevent up to $44 billion in unnecessary capital investment.[12] Citizens agreeing with this view might well regard TURN as detracting from the real issue and sidetracking reforms that would reduce rates. Finally, some consumers would be likely to have the view that TURN's efforts to lower current rates will mortgage the future for slight benefit in the present, and will disproportionately raise future rates.

All of these viewpoints conflict with and have as legitimate a claim to be included as TURN's view. Nor is it fanciful to suppose that such groups will assert their interests in response to the invitation; such diverse organizations as the NAACP[13] and the Friends of the Earth [14] have argued before federal energy agencies. In choosing among such groups, the PUC would in-

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11 Cf. Warren, Regulated Industries' Automatic Cost of Service Adjustment Clauses: Do They Increase or Decrease Cost to the Consumer? 55 NOTRE DAME LAW. 333, 345 (1980).

12 See Foster Nat. Gas Rep. No. 1515, May 2, 1985, at 1 (reporting on efforts to repeal the Powerplant and Industrial Fuel Use Act, accompanied by worst-case estimates of its costing $44 billion and resulting in loss of 1.5 million jobs).

13 NAACP v. FPC, 425 U.S. 662 (1976) (effort to cause FPC to regulate so as to prevent employment discrimination by its regulatees).

14 Just and Reasonable National Rates for Sales of Natural Gas (Opinion 699), 51 FPC 2212, 2288-95 (1974) (effort to use National Environmental Policy Act to force FPC to prepare environmental impact statement for natural gas ceilings rejected as a "complete exercise in futility" that would "so burden this proceeding as to make it impossible to establish just and reasonable rates as required by the Natural Gas Act").

evitably be making the decision to promote or prevent their speech on the basis of its content.[15] Furthermore, if the PUC were to require inclusion of all competing points of view, there would be inadequate room. Thus if groups other than TURN were to respond to the Commission's invitation for applications, and if the Commission were itself to respond favorably, January and February's envelope might be dedicated to pro- and anti-nuclear groups, March and April might be occupied by pro- and anti-cogeneration groups, May might be given to small businesses, June to the AARP, and so on. Indeed, since the potential number of differing points of view is infinite, most would be excluded.

The exclusion would obviously extend to messages that PG&E might otherwise have chosen to distribute. In fact, every message sent by TURN will represent an instance in which the PUC has favored the content chosen by TURN over that chosen by PG&E. The logical extension of the PUC's policy is to require carriage of various "public interest" groups' competing messages during all twelve months of the year, so that PG&E is completely excluded from the use of its own property. There is no reason the Commission cannot accomplish this result if it can do what it has done in the case at bar.

B. The Commission's Approach Places It in the Position of Performing a "Function of Editors"

The Commission's assumption "that the ratepayers will benefit more from exposure to a variety of views" is strikingly similar to the argument considered by this Court in *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), that "government has an obligation to insure that a wide variety of

15 Indeed, the worst possible case would materialize if the variety of applications here hypothesized failed to result. Now that the Commission has favored TURN, the segment of ratepayers that TURN itself favors remains unchecked by any opposing consumer segment whose interests are harmed by TURN's positions.

views reach the public." This Court rejected that argument in *Tornillo*, noting that

> [h]owever much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment.

The essence of the problem, both in *Tornillo* and in the case at bar, is that government is prohibited from intruding in the "function of editors." *Id.* at 254-59. *See also Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980) ("Government action that regulates speech on the basis of its subject matter 'slip[s] from the neutrality of time, place and circumstance into a concern about content' "); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973); *Pittsburgh Press Company v. Human Relations Commission*, 413 U.S. 376, 391 (1973) (decisions do not authorize "any restriction whatever, whether of content or layout," and Court "reaffirm[s] unequivocally the protection afforded to editorial judgment").

For these reasons, the present case is different from *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). Government need not perform any function as "gatekeeper" or "editor" to require a shopping center to accommodate leaflets, as in *Pruneyard*. Government need not evaluate any leaflet to determine whether it is an "appropriate" or "efficient" use of the shopping center. The PUC's approach, however, would require it to decide on a continuous basis, as editor or gatekeeper, which of various competing uses of PG&E's envelope was most appropriate or efficient in any given month.

C. The Commission's Approach Will Reduce Information Available to Consumers from the Utilities that Serve Them, Because it Will Both Exclude and Discourage Such Speech.

Information from utilities is valuable to consumers. To take but one example, utilities have been in the forefront in advocating and explaining conservation measures.[16] Thus the reason that speech by a utility is protected is not merely that it is of value to the utility, but that it is of value to recipients. *Cf. Consolidated Edison Company v. Public Service Commission, supra; Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980).

The avenues of communication available to utilities, however, are limited. Unlike self-styled consumer advocates such as those at TURN or others of Respondents, their personnel are unlikely to be featured guests on television programs, and they are extremely unlikely to be able to obtain charitable contributions to publish their views, as TURN expects to do. Restrictions upon their advertising budgets, which are imposed either directly by regulation or by the marketplace, together with regulatory approaches such as that of the PUC in this case, would reduce the ability of utilities to furnish consumers valuable information concerning how they are serving the marketplace or how consumers can best use the resources available to them.

The editorial intrusion in the present case is all the more likely to discourage such speech because it not only sets up an artificial public forum, but requires carriage of views directly attacking the utility by the utility itself.[17] Such cases as *Wooley*

16 See PG&E Progress, Dec. 1984, at 6, reproduced in Appendix at A-183 (newsletter concerning weatherstripping); Cf. Id. at 3 (window coverings); Id. at 8 (pilotless, energy-efficient appliances). PG&E is typical of local gas and electric utilities in this regard.

17 Nor does the disclaimer required by the Commission solve the problem. No reasonable person would have believed that the car's owner was the author of the motto in Wooley, but the lack of attribution, or lack of necessity of a disclaimer, was not sufficient to support the state's requirement that the objectionable message be carried. Furthermore, the PUC's choice of TURN as the proper entity to be favored with governmentally required use of the billing envelope, reflects the PUC's express finding that TURN's message

v. Maynard, 430 U.S. 705 (1977), and *Columbia Broadcasting System v. Democratic National Committee, supra*, establish what has been called the right not to speak. One rationale for the right not to speak is that, if forced speech is tied to everyday activities or to the exercise of the speaker's own expression, it discourages those activities or speech. *CBS v. DNC, supra.* Throughout the United States, entities such as PG&E will likely be discouraged by the PUC's action here from engaging in speech that is vigorously responsive to current issues, which is the kind of speech that is most likely to be useful to recipients, because they will reasonably fear that their expression will be considered controversial and will invite retaliatory regulation in the form of a requirement that they carry TURN-type inserts. The PUC's action thus assures speech from utilities that will be more bland, timid, and noncontroversial, and hence less useful, than ever before.[18]

II. THE PUC'S DECISION CANNOT BE SUPPORTED BY MONOPOLY OR REGULATORY ARGUMENTS.

A. The Commission's "Wasted Space" and "Property" Rationales Do Not Support Its Decision.

The Commission's "wasted space" or "extra space" reasoning could be equally applied to a wide variety of PG&E property. For example, the side panels of PG&E trucks might be viewed as

is "appropriate" and "efficient." This finding, and the choice of TURN, is itself an endorsement. Finally, the disclaimer does not remove the effect of the order in discouraging PG&E's own expression. See infra note 18 and accompanying text.

18 The disclaimer required by the Commission does not address this concern.

In addition, the possibility that PG&E will be excluded from the use of its own envelope in certain months reduces its speech.

wasted space. Taxicabs and express trucks sometimes carry advertising, and the requirement that one-quarter of PG&E's panel trucks carry a TURN advertisement (or an advertisement from one of the many other groups whose views might conflict with TURN's) would be as logical as the order in question here. Similar reasoning supports the conclusion that vacant utility company offices, such as those not used when employees are on vacation, should be made available to TURN, and utility company secretaries who have any spare time during the day should use that time typing for groups such as TURN. Again, these conclusions are as logical as the one in the present case.

Nor can the "property" reasoning of the PUC support its order. In the first place, property interests are characterized entirely by rights of use and enjoyment,[19] and the PUC's decision creates a fictional property in order to deprive PG&E of the use of the actual property, its envelope. Further, it is meaningless to speak of a property interest in "extra space" that would be theoretically held as a tenancy in common by millions of people with antithetical interests, the ratepayers. The same reasoning could be used to convert every item of shareholders' property to "ratepayers' property." The assignment of that alleged property to a single entity such as TURN, which has interests antagonistic to the uses many persons would make of it, cannot be justified by any traditional view of property.

B. The Utility in Question Does Not Have a Monopoly on the Media of Communications, and its Billing Envelope is Not a Public Forum.

PG&E does not have a monopoly in any sense upon any medium of communication. Its customers have access to many television channels, dozens of cable channels, a variety of metropolitan newspapers, a wide selection of neighborhood news sources, dozens of radio stations, thousands of periodicals, and an infinite variety of communications by mail or telephone. By

19 See infra note 20.

indicating interest in the views of any of a diverse variety of organizations (presumably including TURN), and sometimes for the payment of a modest fee, PG&E's customers can cause themselves to be recipients of the newsletters of groups ranging from Accuracy in Media to the ACLU. Furthermore, any organization can reach PG&E's customers, through solicitation by mail, telephone, or other media. Thus the State's authority to regulate does not, and cannot, find its justification in any defect in the communications market.

In *Perry Education Association v. Perry Local Educators' Association*, 103 S. Ct. 948 (1983), this Court rejected an argument strikingly similar to Respondents' here. A union seeking to organize teachers sued for the right to use the school's internal information distribution system and internal teacher mailboxes. The Court squarely held that the school's internal distribution system was not, by tradition, a public forum; neither was it dedicated as a "limited public forum," as the union argued, or as TURN argues here. Furthermore, the mere fact that the school allowed church groups, the YMCA, or the Cub Scouts to use the internal system did not make it a "limited public forum." Nor did its use by the union's rival, which was an established teacher union. The Court in *Perry* relied heavily upon the existence of a wide variety of media of expression, including the post office, that were available to the petitioner there and are available to TURN here. *Perry* squarely refutes the monopoly contention in the case at bar, as well as the contention that PG&E's use of its own billing envelope makes the envelope a public forum.

The State's authority to regulate, here, derives from PG&E's natural monopoly in the furnishing of gas or electricity. Regulation is a substitute for economic competition. This regulatory authority is not unlimited; it must not be exercised so as to engage in management decisions or interfere with PG&E's legitimate use of its property or exercise of its business.[20] As this

20 Historically, this regulatory authority traces to Munn v. Illinois, 94 U.S. 113 (1877), in which the court said that the grain elevators

Court has said, "While the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and it is not clothed with the general power of management incident to ownership. . . ." *Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Commission*, 262 U.S. 276, 289 (1923); *See also* Pond, *Restraining Regulatory Activism: The Proper Scope of Public Utility Regulation*, 35 ADMIN. L. REV. 423 (1983) (discussing *Consolidated Edison* and *Central Hudson* as well as other cases in the context of the asserted "monopoly" justification for regulation).

The same argument concerning monopoly made by the PUC here could actually be better asserted in *Perry Education Association, supra*, or in the case of a major metropolitan newspaper. While PG&E does not have a monopoly (or anything close to one) in the relevant media of expression, a metropolitan newspaper in the United States today is in fact very likely to be precisely such a monopoly. Yet no court would accept the argument that such a newspaper, no matter how firmly established its monopoly might be, could be required to provide

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at issue "stand . . . in the very 'gateway of commerce,' and take toll from all who pass." Id at 132. PG&E stands at the "gateway of commerce" only with respect to gas and electricity. It does not stand at the "gateway of commerce" in expression or communications; in fact, it is itself a user and tollpayer at that gate.

This Court has repeatedly rejected efforts to require even businesses affected with a public interest to allow public use of their property without compensation. E.g., Reagan v. Farmer's Loan & Trust Co., 154 U.S. 362, 410 (1894) ("Is it any less a departure from the obligations of justice to seek to take, not the title, but the use, for the public benefit, at less than its market value?"); Smyth v. Ames, 169 U.S. 466, 546 (1898) ("the corporation may not be required to use its property for the benefit of the public without receiving just compensation"); Bowles v. Willingham, 321 U.S. 503, 517 (1944) (rent controls upheld only on condition that owners not be required "to sell any commodity or offer any accommodation"); NAACP v. FPC, supra; Consolidated Edison Co. v. Pub. Serv. Co., supra; Central Hudson Gas & Elec. Corp. v. Pub. Serv. Co., supra.

its pages for the use of a separate entity selected by a government agency, when the newspaper's own editors would not choose to publish the view of that separate entity and indeed would not even see the pages until they were published. Precisely that result has been reached by the PUC here. *See Miami Herald Publishing Company v. Tornillo, supra.* Such a requirement would be unconstitutional even in the broadcasting context, in which there is justification for regulation to prevent frequency interference. *Columbia Broadcasting System v. Democratic National Committee, supra.* It is even less logical to uphold such a requirement in the case of an entity such as PG&E, that is not in the communications business and has no claim to any communications monopoly.

A part of TURN's argument hinges on the theory that TURN will obtain more reader attention for its monetary solicitations if they are sent with the recipient's electric bill. Thus TURN expects to gain a fundraising advantage over groups that must use direct mail, such as the American Cancer Society, the YMCA, or the Cub Scouts, by using for solicitation purposes an envelope that a captive audience must open and give attention to. TURN's effort to obtain such a competitive advantage in the marketplace of fundraising is not a cognizable legal interest. It consists, ironically, of an effort to obtain the involuntary competitive benefits of the billing envelope for the benefit of TURN, so as to obtain monetary contributions that would otherwise flow to charitable organizations that PG&E's customers might consider more worthy. TURN's argument in this regard is inconsistent with *Perry Education Association, supra.*

CONCLUSION

The decision of the California Public Utilities Commission is inconsistent with the first amendment and should be reversed.

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No. 84-1044

In The

Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
a California corporation,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE, AMICUS CURIAE, IN SUPPORT OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

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BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE, AMICUS CURIAE, IN SUPPORT OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

INTEREST OF THE AMICUS CURIAE

The California Chamber of Commerce ("The Chamber") submits this brief in support of Appellant Pacific Gas and Electric Company ("PGandE"). All parties have consented.

The Chamber is a voluntary, nonprofit, California-wide business association, with more than 4,800 members

from virtually every industry and geographic section in the state. Ninety percent are small or medium-size businesses. The Chamber's membership also includes 150 trade associations, and it is affiliated with and regularly communicates on current business issues with 387 local and regional chambers of commerce and more than 167,000 small businesses. The Chamber estimates that its members and affiliated local chambers employ 75 percent of the private sector work force in California.

The Chamber (a) advises its members of state and federal legislative and judicial developments; (b) appears for its members before local, state and federal legislative bodies; (c) sponsors educational seminars and commissions publications to inform its members of their obligations under the law; and (d) initiates legal proceedings to protect the interests of its members.

The Chamber, on behalf of its members and affiliates, is vitally interested in the issues involved in this case. The decision of the California Public Utilities Commission ("the Commission") poses a threat to fundamental rights of property and expression. Accordingly, The Chamber respectfully urges the Court to reverse the judgment of the California Supreme Court upholding the unconstitutional order of the Commission, and to vacate the Commission's decision.

———o———

SUMMARY OF ARGUMENT

Each month for sixty years, PGandE has used the space in its billing envelopes to express its views to its customers. The Commission has now held that PGandE's

ratepayers have a property interest in "extra space" in PGandE's billing envelopes, and has ordered PGandE to insert messages of its adversary in the envelopes to be sent to PGandE's customers. Thus, under the guise of redefining established property rights, the Commission has attempted to promote certain speech, discourage other speech, and avoid strict scrutiny of its actions. This violates PGandE's first amendment rights. *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530 (1980); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557 (1980).

The Commission's approach is an impermissible attempt to make an end run around the first amendment. Even if its approach were valid, the Commission's particular property-definition decision violates settled principles of law and has no basis in fact. *Board of Pub. Util. Comm'rs v. New York Tel. Co.,* 271 U.S. 23 (1926).

The restriction on PGandE's speech cannot be justified as a narrowly tailored means of serving a compelling state interest. First, the state interest the Commission identifies—increasing consumer participation in Commission proceedings—is simply not compelling. Second, the means chosen to serve that interest are only indirectly related to it, and there are superior alternatives that the Commission did not consider.

The Commission's decision is not a reasonable time, place or manner restriction either. The decision does not restrict PGandE's speech because its time, place or manner is disorderly or invades the rights of others. Rather, the decision restricts PGandE's speech so that it can be replaced in the *same* time, place and manner by the speech of others who will express different opinions. That is

content regulation, not time, place or manner regulation, and it violates the first amendment.

Finally, the Commission's decision forces PGandE to publish the opinions of its adversary with which it disagrees. This is a plain violation of PGandE's right not to speak. *Wooley v. Maynard,* 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974).

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ARGUMENT

The Commission has decided that although PGandE owns the envelopes in which it sends its bills, because of an accident of postal service rates, the ratepayers have a quasi-property interest in the extra space in the billing envelope, and that therefore the Commission can dictate who may speak in that space and when. In essence, the Commission seeks to promote speech by people whose views are opposed to PGandE's and to evade first amendment scrutiny by redefining what has always been (and still is) PGandE property:

> Since the [extra billing envelope] space is not the property of PGandE in the first place, it has no right to use the space for First Amendment purposes.

(Dec. 83-12-047, Appendix to Jurisdictional Statement of Appellant Pacific Gas and Electric Company ("App.") p. A-22) The Commission's decision is an abuse of its power that offends basic first amendment principles and threatens the free speech rights of all citizens. Both the Commission's approach and its particular decision are unsound.

I. The Commission's Decision that Ratepayers Own the Space in PGandE's Billing Envelope Is Incorrect, Unsound and Unwise.

A. A State Should Not Be Permitted to Redefine Property Rights for the Purpose of Abridging the Right of Free Speech.

PGandE has mailed its monthly newsletter, *Progress,* to ratepayers in the "extra space"[1] of its billing envelopes for sixty years. The Commission never questioned PGandE's ownership of that space or its exclusive right to use it. Suddenly, in response to a request for access to that space by PGandE's adversary, TURN,[2] the Commission has decided that PGandE does not "own" the extra space after all, and that TURN must be allowed to use it to communicate its own messages to PGandE's customers.

Notably, the Commission declines to hold that the billing envelope is itself ratepayer property. (Dec. 83-12-047, App. pp. A-2 - A-3) Yet the Commission holds that because postage is considered in setting utility rates, the "extra space"—variously described as an "artifact" (*Id.*) and an "accident" (Dec. 84-05-039, App. p. A-55 (Calvo, dissenting)) — has value that should not be used by PGandE, but should benefit the ratepayers. From this, the Commission concludes that "the extra space in the billing envelope 'is properly considered as ratepayer property.'" (Dec. 83-12-047, App. p. A-3 (quoting Dec. 93887, App. p. A-72)) The Commission, however, is vague in defining

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[1] The Commission defines "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." (Dec. 83-12-047, App. p. A-3)

[2] TURN is the acronym for Toward Utility Rate Normalization, the real party in interest.

the precise nature of the ratepayers' interest and right to control that space:

> We have stated that the extra space belongs to the ratepayers. In so doing, we are not so much describing a traditional property right as an equity right.

(Dec. 83-12-047, App. p. A-4 (quoting Dec. 83-04-020, App. p. A-100))

Although the nature and extent of the ratepayers' purported property interest is unclear, the Commission's purpose in creating it is evident:

> Our goal . . . is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E.

(Dec. No. 83-12-047, App. p. A-17). Moreover, the Commission's "unjust enrichment" theory of property definition demonstrates that the Commission is as concerned that PGandE *not* benefit from any extra space as it is that the ratepayers do benefit from it. (Dec. 93887, App. pp. A-67 - A-69; Dec. 83-12-047, App. p. A-3; Dec. 84-05-039, App. p. A-52)[3]

Thus, the Commission transforms an accident of postal rates into a nebulous property interest for the purpose of promoting the particular messages of TURN or others whose message the Commission considers "meritorious." (Dec. 83-12-047, App. at A-19) This is clearly a content-based regulation of speech, and it violates the first amendment.

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[3] What the Commission really seems to be saying is that *it* owns the extra space.

Although for due process purposes, property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law," *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972), this Court has never held that a state may redefine property rights as a means to enjoin or promote particular speech. The Commission cites no authority for its novel attempt to avoid first amendment concerns by redefining property interests. As noted by one of the Commissioners, dissenting from the decision, "there is absolutely no precedent for, or constitutional basis of [sic] a dilution and transfer of a person's property right in order to justify a restriction upon that person's right of free speech." (Dec. 83-12-047, App. p. A-58 (Bagley, dissenting))

The only conceivable support for the Commission's decision is *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), and it does not authorize a redefinition of property rights as a means of promoting or discouraging certain speech. In *PruneYard,* the Court upheld the decision of the California Supreme Court that the California Constitution protects speech and petitioning reasonably exercised in privately owned shopping centers. The Court did not hold, however, that a state may grant a property interest in shopping centers to patrons, thereby conveying a right to speak and curtailing the speech rights of the true owner. Rather, the Court held that where a property owner invites the use of the property by the public, the state may, on a content-neutral basis, protect the rights of the public to speak there. 447 U.S. at 87.

This case is the converse of *PruneYard.* PGandE has never allowed the public to use the extra space in its

envelopes; for sixty years it has used that space itself, exclusively. Thus, it is the state, not PGandE, that has invited the public to use PGandE's property. Moreover, in doing so, the state does not merely seek to protect the rights of all to speak in a place voluntarily opened to them by the owner; it seeks to promote the speech of a particular group with a particular message. *PruneYard* is thus inapposite.

The Commission's approach is profoundly troubling. If upheld, states may, by an oblique relabeling process, circumvent the strict scrutiny given to governmental intrusions on the right of free speech. The right of free speech would vary at the whim of the individual state, reducing the now-universal constitutional right to a nullity. The Court should not sanction such a radical departure from fundamental constitutional principles, especially where, as here, the basis for the redefinition of property interests is legally and factually unsupported, and the nature of the interest is not even defined.

B. There Is No Legal or Factual Support for the Commission's Redefinition of Property Rights.

1. The Commission's Decision Has No Legal Basis.

Many years ago this Court rejected the notion that ratepayers have a property interest in the property a utility acquires with revenues received from the ratepayers. The seminal case defining the relationship between a utility and its customers and the rights of shareholders and ratepayers in utility property is this Court's decision in *Board of Pub. Util. Comm'rs v. New York*

Tel. Co., 271 U.S. 23 (1926), in which the Court held that the ratepayers were not entitled to the benefit of an admittedly excessive depreciation reserve. The Court said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stock.

271 U.S. at 32. *See Pacific Tel. & Tel. Co. v. Public Util. Comm'n*, 34 Cal. 2d 822, 828-29 (1950) (devotion of property to public use does not vest title to the property in public). Indeed, in *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980), the Court specifically recognized that a utility's billing envelopes belong to it, rather than to the ratepayers. The Court held that the state Public Service Commission could not prevent the utility from utilizing *"its own billing envelopes* to promulgate its views on controversial issues of public policy." *Id.* (emphasis added).

The Commission's decision cannot be reconciled with these decisions or with their controlling principle. Indeed, the Commission's efforts to avoid the principle have produced a far-reaching decision with no coherent rationale and no discernible boundaries.

2. The Commission's Decision Has No Factual Basis.

The Commission proceeds from the premise that postage costs are factored into the utility rates set by the

Commission. (Dec. 83-12-074, App. p. A-3; Dec. 93887, App. p. A-67) From this the Commission concludes that any extra space in billing envelopes "belongs" to the ratepayers. As noted above, this analysis defies the law as set down by this Court half a century ago. It also defies logic and the facts.

First, if the Commission is truly interested in determining the ratepayers' interest (if any) in the empty space, shouldn't it examine the whole of PGandE's costs and revenues to determine whether PGandE's use of the extra space makes PGandE's overall rate of return no longer "just and reasonable?"[4] The Commission's decision never considers this question.

Second, if the Commission must fixate on a single item in the total picture, shouldn't it at least consider the *actual* mailing costs rather than those projected in an earlier rate-making proceeding? The Commission concedes that the ratepayers don't *actually* pay for the "extra" space because the true mailing costs exceed projections. (Dec. 83-12-047, App. pp. A-8 - A-9) Thus, apart from its other deficiencies, the Commission's decision is a theoretical construct resting on a premise that is contrary to fact.

Third, if the Commission is going to decide this matter by toting up whether the ratepayers get what they

[4] If this analysis uncovered any "unjust enrichment" the Commission could easily correct it by an adjustment of rates, which would not raise any constitutional problems. *Cf. Consolidated Edison,* 447 U.S. at 543 ("[T]here is no basis in the record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base. Mere speculation of harm does not constitute a compelling state interest").

pay for, shouldn't it also consider what they get but don't pay for? The Commission acknowledges that PGandE's *Progress* contains information of value to the ratepayers. (Dec. 93887, App. p. A-69) Although PGandE pays for *Progress,* the Commission merely alludes to this other side of the ledger, and it gives PGandE no credit for this value that the ratepayers receive free of charge. (*Id.*)

Fourth, if inclusion of mailing costs in rates makes the extra envelope space belong to the ratepayers (in some sense), why doesn't everything else paid for by the ratepayers also belong to them (in some sense)?[5] If the notion is that "extra" space is different because it represents a value the ratepayers paid for but didn't receive, then why isn't all utility property with some "extra" economic potential treated the same way? Virtually all physical property has "extra" potential economic value, at least as advertising space. Are ratepayers entitled to use it that way? As Commissioner Bagley noted:

> Regardless of source, what are "the consequences beyond the circumstances presented in this case"? The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle—to name just a few relevant examples—have "excess space" and "economic advertising value". Some utility corporations place bumper-strip messages on their vehicles. Buses and trucks regularly carry adver-

[5] Indeed, the arbitrary and piecemeal nature of the Commission's approach is evident in its own analysis. Although the Commission finds that both postage costs *and* envelopes are included in utility rates (Dec. 93887, App. at A-67), the Commission concludes that the ratepayers own the extra space in the envelopes, but not the envelopes themselves. (Dec. 83-12-047, App. p. A-3) The Commission does not explain this disparity.

> tising messages. In the words of the majority at page 23 of the decision, "It is reasonable to assume that the ratepayers will benefit from exposure to a variety of views . . ." Is it the postulate of this Commission, flowing from the decision's stated premise, that any three Commissioners at any time might decide that ratepayers would benefit from exposure to some particular socially desirable message from some ratepayer group making use of any or all such areas of excess valuable space?

(Dec. 83-12-047, App. p. A-40 (Bagley, dissenting)) Moreover, why do the ratepayers' property interests entitle ratepayers only to use extra space to speak? Shouldn't ratepayers, as "owners" of the "extra" capacity of utility property, be entitled to use the after hours "extra" capacity of utility offices, equipment and vehicles?

Fifth, the Commission's order in effect conditions PGandE's right to speak on arbitrary factors—the weight of paper used in bills and inserts, the postage-rate structure and the volume of legal notices that may be required in any given mailing. Where "extra space" is determined based on these arbitrary factors, it is irrational to premise first amendment rights on the ownership of that space. *See* Dec. 84-05-039, App. p. A-55 (Calvo, dissenting) ("The 'extra' space in the PG&E billing envelope is really not 'property' but is something of an accident").[6]

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[6] The injustice of the Commission's property-definition decision is compounded by the terms of its order. TURN is guaranteed access to extra space four times per year. (Dec. 83-12-047, App. pp. A-17 - A-18) PGandE can use the remaining space, if there is any, but has no comparable guarantee of access. Moreover, by granting PGandE access to space TURN chooses not to use, the Commission permits TURN to regulate PGandE's speech. As the dissent points out:

(Continued on following page)

If first amendment rights turn on the state's definition of property interests, that property definition must be based upon facts and reasoned analysis. The Commission's decision here defies reason and ignores the facts; it should not be the basis for abridging first amendment freedoms.

C. The Commission's Decision Has No Limit.

The Commission does not explain the source of its purported authority to redefine the property interests in PGandE's extra envelope space and does not place any limit on the authority of the state to redefine property rights. Accordingly, if upheld as a basis for denying first amendment rights, the Commission's decision has potentially infinite application. The result could be disasterous for small businesses and perhaps even individuals.

Even assuming that the state's regulatory authority over public utilities affords a basis for the Commission's decision, that authority does not limit the scope of its ruling. The State of California extensively regulates many industries, professions, banks and corporations. *See, e.g.*, Cal. Food & Agric. Code § 1 *et seq.* (Deering 1983)

(Continued from previous page)

> And now under the revised order TURN can determine, solely by its choice of paper weight, whether or not and if so how much material will be inserted in the envelope by defendant's management on behalf of shareholders. Under this order we have the unseemly situation where government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other. That, compared to government proscription, is deprivation squared.

(Dec. 84-05-039, App. A-59—A-60 (Bagley, dissenting))

(regulating agriculture industry); Cal. Bus. & Prof. Code § 5000 *et seq.* (Deering 1976) (regulating 24 different professions); Cal. Fin. Code § 215 *et seq.* (Deering 1978) (regulating banks); Cal. Fin. Code § 18000 *et seq.* (Deering 1978) (regulating industrial loan companies); Cal. Bus. & Prof. Code § 16603 (Deering 1985 Supp.) (regulating sale of horror comic books). If the state can use that regulatory power to redefine the property rights of a utility, what will stop it from using it to do the same thing to the others it regulates?[7]

For example, a state might wish to regulate meat storage and packaging in butcher shops to protect the public from the dangers of meat contamination or spoilage. *See, e.g.,* Cal. Food & Agric. Code § 18691 (Deering 1985 Supp.) ("It is essential in the public interest that the health and welfare of the consumers be protected by assuring that meat . . . distributed to them [is] wholesome, not adulterated, and properly marked, labeled, and packaged"). Imagine a local butcher shop, subject to the state's regulation, which has a practice of inserting into the paper bags of its customers a leaflet promoting the health virtues of beef. The state, in its zeal to give consumers "exposure to a variety of views" on health issues, might redefine the paper bag as customer property (after all, the customer pays for it the same way ratepayers pay for billing envelopes), thereby giving vegetarian or health-related groups access to meat-consumers they might not otherwise reach.

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[7] Nor is the Commission's decision limited by the fact that utilities are monopoly businesses that recover their costs from ratepayers. As this Court has noted in the advertising context, both ordinary businesses and public utilities pass their expenses on to consumers. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 568 n.11 (1980).

Justice Powell has suggested other examples:

> A minority-owned business confronted with distributers from the American Nazi Party or the Ku Klux Klan, a church-operated enterprise asked to host demonstrations in favor of abortion, or a union compelled to supply a forum to right-to-work advocates could be placed in an intolerable position if state law requires it to make its private property available to anyone who wishes to speak.

PruneYard, 447 U.S. at 99 (Powell, concurring). If the conclusory "reasoning" of the Commission is sufficient to redefine property rights and circumvent the first amendment in this case, zealous agencies could easily conceive of plausible redefinitions of other property rights that might produce these intolerable results.[8]

II. The Commission's Decision Is an Unconstitutional Interference with PGandE's First Amendment Rights.

The Commission's decision restricts PGandE's right to mail its monthly newsletter, *Progress,* to its customers, a channel of communication PGandE has used each month for 60 years. In addition, the decision forces PGandE to send to its customers messages prepared by its adversary. On its face, this order violates PGandE's first amendment rights.

The Commission rejected PGandE's first amendment arguments largely by reasoning that "since that

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[8] TURN itself might be forced to provide a forum for PG&E. The state, as part of its regulation of non-profit consumer organizations, might redefine the empty space in the envelopes of organizations such as TURN as the property of all contributors. The state might then require TURN to include the statements of PG&E if ever PG&E chose to contribute to TURN.

[extra billing envelope] space is not the property of PGandE in the first place, it has no right to use the space for First Amendment purposes." (Dec. 83-12-047, App. p. A-22) Since the Commission's premise is incorrect, its reasoning is unsound and the first amendment violation is clear. None of the Commission's other justifications for its action has any merit either.

A. The Decision Violates PGandE's Right to Free Speech.

1. The Order Is Not a Narrowly Tailored Means of Serving a Compelling State Interest.

This Court's decision in *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530 (1980), is a square holding that a state may not constitutionally prevent a public utility from using its billing envelopes to communicate with its customers. This decision is dispositive, and sets the standard by which the Commission's order must be judged:

> Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.

447 U.S. at 540. The Commission fails to establish either a "compelling state interest" or a "precisely drawn means."

The alleged state interest here "is the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." (Dec. 83-12-047, App. p. A-22 (*quoting* Dec. 83-04-020, App. p. A-103)) The Commission

does not explain *why* that is a *compelling* interest, and it is not. Commendable as the Commission's goal sounds, it does not rise to the level of a "compelling state interest" that can override free speech. In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Court found the state interest in balancing political power to be insufficient to justify restrictions on campaign expenditures, and said:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .

424 U.S. at 48-49. That is directly applicable here. The Commission offers no answer to it.

Nor is the Commission's means of achieving its goal carefully tailored. Although the Commission asserts that a "shared approach to use of the extra space" (Dec. 83-12-047, App. p. A-22) constitutes a sufficiently narrow regulation, that is simply a conclusion with no supporting analysis. In fact, there are many obvious alternative means of increasing consumer participation in regulatory proceedings that do not entail any restrictions on utility speech, none of which was considered in the Commission's decision.[9] How, then, can its restriction be said to be precisely drawn?

2. The Order Is Not a Reasonable Time, Place or Manner Restriction.

Consolidated Edison embraced an alternative test that the Commission claims justifies its restriction on PGandE's speech. The Court "has recognized the validity of reasonable time, place, or manner regulations that

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[9] *See, e.g.,* Brief of Appellant Pacific Gas and Electric at Section IIC.

serve a significant governmental interest and leave ample alternative channels for communication." *Consolidated Edison,* 447 U.S. at 535. However, a "constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of the speech." 447 U.S. at 536. As the Court said:

> [T]he essence of time, place, or manner regulation lies in the recognition that various *methods* of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares at 2 a.m. disturbs neighborhood tranquility.

Id. (emphasis added).

Thus, time, place or manner restrictions on the *method* of speech have been permitted in a few well-defined circumstances where that was necessary to protect against "substantial disorder or invasion of the rights of others."[10] Here, however, the Commission does not restrict PGandE's speech because its time, place or manner is disorderly

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[10] *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503, 513 (1969) (school may not punish students for wearing black protest armbands. *See also Grayned v. City of Rockford,* 408 U.S. 104, 118 (1972) (antinoise regulation to maintain order of education facility constitutional); *United States v. O'Brien,* 391 U.S. 367, 377 (1968) (statute prohibiting destruction of draft card is constitutional); *Cox v. Louisiana,* 379 U.S. 536, 554 (1965) (licensing requirement for parades to regulate traffic constitutional). *Cf. Linmark Assoc., Inc. v. Willingboro,* 431 U.S. 85, 95 (1977) ("important governmental objective" to "promote integrated housing," but statute prohibiting "for sale" signs unconstitutional); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 766 (1976) ("strong interest" of state in maintaining "professionalism on part of licensed pharmacists," but prohibition on prescription drug price advertising unconstitutional); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 208-15 (1975) (protection of children, privacy, or flow of traffic insufficient interests to validate anti-obscenity ordinance).

or invades the rights of others. Rather, the decision restricts PGandE's speech so that it can be replaced by the speech of others in the *same* time, place and manner.[11] No case has held that the time, place or manner doctrine may be used offensively, as the Commission does here, to give another party a right it would not otherwise have.

Moreover, the Commission's order fails to satisfy the requirement that time, place, or manner regulations be "applicable to all speech irrespective of content." *Erznoznik v. City of Jacksonville,* 422 U.S. at 209. The Commission's claim that its decision "is neutral as to content of the parties' messages" (Dec. 83-12-047, App. p. A-21), ignores the realities of what it has done. It is insisting on the inclusion of consumer, as opposed to utility, viewpoints precisely because it anticipates the content will be different. (Dec. 83-12-047, App. p. A-17) Therefore, the Commission clearly is restricting "expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley,* 408 U.S. 92, 95 (1972). Like the New York Commission in *Consolidated Edison,* the Commission's "own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation." 447 U.S. at 537.

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[11] The fact that PGandE can pay extra to include *Progress* in the billing envelopes used by TURN does not cure the constitutional problem. The Commission cites no case that allows a state selectively to impose a fee for speech.

B. The Decision Violates PGandE's Right to Refrain from Speaking.

The Commission acknowledges that *Wooley v. Maynard,* 430 U.S. 705 (1977), and *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), stand "for the clear proposition that the First Amendment right to free speech also includes the right to refrain from speaking and the right not to be compelled by government to publish that which one does not wish to publish." (Dec. 83-12-047, App. p. A-23) The Commission's sole response is as follows:

> This argument, of course, again assumes that we are asking PGandE to publish the messages of TURN or others. In fact, as we explained above, we are simply ordering PGandE, which has physical control over the billing space, to make it available for the benefit of ratepayers. We are not asking PGandE to publish anything as its own.

(*Id.* (as modified by Dec. 84-05-039, App. p. A-51))

What the Commission means by this response is not clear. If the argument is that PGandE has no first amendment interest because it does not own the space in the envelopes, it is simply wrong. (pp. 5-13 above)

If the argument is that requiring PGandE to place TURN's materials in the PGandE envelopes and to mail them to customers does not force it to "publish" anything, it is contrary to any realistic and meaningful interpretation of the first amendment. The point of the first amendment in this application is that a person may not be forced actively to assist in the dissemination of

the opinions of others.[12] That is precisely what the Commission's decision does to PGandE, and it is precisely what *Miami Herald* and *Wooley* forbid. *See also* Dec. 84-05-039, App. pp. A-55 - A-56 (Calvo, dissenting).

Finally, if the Commission rests its response on the narrow point that PGandE is not required to publish TURN's opinions *as its own,* it again misses the point of *Miami Herald* and *Wooley.* The concern in those cases was not that anyone was being forced to pass off someone else's views as his or her own.[13] The concern in *Wooley* was with requiring a person "to participate in the dissemination of an ideological message" and to become "the courier for such message." 430 U.S. at 713, 717. Similarly, in *Miami Herald,* the concern was with compelling publication of material that editors and publishers do not wish to publish, thereby interfering with their editorial judgment as to the size and content of the publication. 418 U.S. at 258. Those same concerns are present here, but the Commission does not even mention them. Its decision is in direct conflict with the first amendment.

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[12] The Commission's decision is particularly offensive because, not only does it order PGandE to include TURN's statements in PGandE's billing envelopes, but it orders PGandE "to use *its* equipment to put the inserts of others into the billing envelope extra space." (Dec. 83-12-047, App. p. A-23 (emphasis added))

[13] In *Miami Herald* the statute required publication of replies to the publisher's own materials. No one would have thought the newspaper was the source of the replies. In *Wooley,* the message was to appear on every license plate in the state. Again, it would have been obvious that the message was not that of each car owner.

CONCLUSION

The Commission's action in this case strikes at the heart of fundamental property rights and first amendment values, and not only for the parties to this case. The decision is ill-conceived and unwise. This Court should reverse it.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF *AMICI CURIAE* PACIFIC BELL, *ET AL.* IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Does an order of a state public utilities commission violate the First Amendment of the Constitution of the United States by compelling a privately-owned public utility to include in its monthly billing envelope the messages of a third party?

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OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

INTEREST OF THE *AMICI CURIAE*, PACIFIC BELL, *ET AL.*

Pacific Bell is a privately-owned public utility company providing telecommunications services to a majority of the people of the State of California. The telecommunications services it provides and the rates it charges therefor in California are subject to the regulation of the appellee, the Public Utilities Commission of the State of California ("CPUC" or "Commission"), except insofar as that authority is preempted by the Federal Communications Commission.

As was the case with Pacific Gas & Electric Co. ("PGandE"), complaints have been filed with the Commission seeking to compel Pacific Bell to make available to third parties the use of Pacific Bell's mailings to its customers for the third parties' communications, both additional to and supplanting Pacific Bell's communications. The Pacific Bell cases before the Commission have long since been fully briefed and argued, but no opinion or order has issued from that agency. Obviously, any disposition of this case on its merits will seriously affect the Commission's judgment in the Pacific Bell cases, although there are constitutional questions raised by Pacific Bell other than the

one proferred here by PGandE. As *amici*, we confine ourselves here to the question presented by the appellant, whether the action of the Commission violates the commands of the Speech and Press Clauses of the First Amendment.

General Telephone Company of California, Southern California Edison Company and Southern California Gas Company, also *amici curiae* here, are the three largest public utility companies in the State of California, with the exceptions of PGandE and Pacific Bell. None of these three utility companies has yet been ordered by the CPUC to allow third parties to use the utilities' mailings for their own communications. These utilities are regulated by the CPUC and would be subject to any rule validated by this Court, and the outcome of these proceedings will have a significant effect upon their operations.

We have received the written permission of the parties to this case to file this brief *amici* and these have been filed in the office of the Clerk.

ARGUMENT

I. WHAT THIS CASE IS NOT ABOUT.

It is appropriate at the outset to clear the atmosphere of certain of appellees' suggestions that tend to becloud the questions in issue here.

First. This case does not present a question whether the CPUC can preempt for its own use the mailing envelopes of PGandE or compel PGandE to deliver the CPUC's messages to PGandE customers. The issue here is rather whether the CPUC can commandeer the utility's usual medium for communication with its customers, its mailings, for third parties to solicit funds for their own use and to disseminate their "literature". The voluntary associations which are appellees, however self-righteous, have no cloak of governmental office and are in no ways surrogates of the CPUC. Nor does anything in California law warrant a delegation of CPUC authority to them.

Second. There is no question here, either, whether the CPUC can require PGandE stockholders, rather than the ratepayers, to pay a part of the mailing costs for those envelopes in which PGandE places its communications along with its bills. One thing certain, however, is that the PGandE customers do not pay any more for PGandE mailings which contain communications from PGandE along with bills than they would pay if the mailings consisted of bills alone, since there is a minimum first-class postage charge for all such mail weighing up to one ounce, and the PGandE bills have been sent in mail weighing not more than one ounce.

Third. There is no question raised here whether the CPUC could authorize or compel PGandE to make available a mailing list of its customers to designated third parties and, if so, at what charge. (Parenthetically, it is noted that the names and addresses of a great majority of Pacific Bell's and General Telephone's customers are published in telephone directories.)

The sole questions before this Court are whether the CPUC can compel PGandE to act as publisher of the messages of third parties—and whether the CPUC can inhibit PGandE from publishing its own messages—by requiring it to include the messages of third parties in its billing envelopes.

II. PGandE'S COMMUNICATIONS TO ITS CUSTOMERS BY WAY OF INSERTS IN ITS BILLING ENVELOPES ARE SPEECH PROTECTED AGAINST REGULATION BY THE STATE BY REASON OF THE FREE SPEECH PROVISION OF THE FIRST AMENDMENT.

That the use of its billing envelopes by a public utility to communicate messages to its customers is an exercise of protected speech is clearly established by this Court's decision in *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U.S. 530 (1980). Whether the communication from a utility takes the form of a "bill insert" or newspaper advertising, whether the subject matter of the communication relates to the business of the utility with its consumers or to a matter of "public controversy," this Court has held these communications to be protected forms of expression under the free speech provisions of the First Amendment. *Ibid.; Central Hudson Gas & Elec.* v. *Public Service Comm'n,* 447 U.S. 557 (1980).

It is doubtful that the speech in question here belongs in the less protected category of "commercial" speech. *See, e.g.,* concurring opinions in *Central Hudson,* 457 U.S. at 572, 573, 579. While we do not know what the content of the communications will be, it will not necessarily fall into the category of offering or advertising goods or services for sale. As the record indicates, the challenged order requires that "PG&E shall give TURN access to the extra space in the billing envelopes four times a year for the next two years. PG&E shall be permitted to use the extra space during the remaining months." App. A-32.

"PG&E and TURN shall each determine the content of its material." *Ibid.* Whether "pure" speech or "commercial" speech, however, the result commanded by the Constitution must be the same. If "pure" speech, it is patently beyond this form of censorship by the CPUC; if "commercial" speech, the CPUC has failed to establish the necessity for its censorship, which it has the burden to prove.

III. IF THE "EXTRA SPACE" IN PGandE'S BILLING ENVELOPES IS "PROPERTY", IT IS PGandE'S PROPERTY; THE "EXTRA SPACE" IS NOT SUBJECT TO CONTROL OF THE CPUC; AND IT DOES NOT CONSTITUTE A PUBLIC FORUM.

The decision of the Commission is predicated on erroneous premises: first, that the space in the envelopes in which PGandE mails its bills to its customers is property which does not belong to PGandE; second, that the CPUC has authority to determine the use of the billing envelopes; and third, that the space in the envelopes in which PGandE mails its bills to its customers constitutes a public forum. These premises are all in error. Even if PGandE were a government corporation, the space in the envelopes would not constitute a public forum.

The essence of a public utility is not that it or its property is owned by the public but that it provides products or services which must be made available without discrimination to all who would purchase them. To assure these results, services offered by the utility to the public are subject to the terms, conditions, and rates fixed according to due process by the state regulatory agency.

It seems never to have occurred to anyone prior to the decision in *Consolidated Edison* to suggest that anyone other than the sender "owned" the space in a first-class mailing envelope. The *ad hoc* creation of a property interest somewhere else is an imaginative but unprecedented conception. It had never been suggested that the many utilities throughout the country which have included circulars with their bills have been

chargeable with trespass d.b.a. for the use of property that was not theirs or that they were guilty of conversion. Indeed, the idea that there might be "property rights" to the inside of first-class mailing envelopes has not been a subject of much judicial consideration otherwise than to acknowledge the mandate of the Constitution that government keep its hands off and its nose out of the contents of the mails. Cf., e.g., Bolger v. Young's Drug Products Corp., 463 U.S. 60, (1983); Blount v. Rizzi, 400 U.S. 410 (1971); Lamont v. Postmaster General, 381 U.S. 301 (1965).

There is a very good reason why the "extra space" or any space in a mailing envelope has not been treated as "property" subject to regulation by a state. The use of the mails is not a state-created right at all. What may or may not be put into the mails and who shall have the privilege of using them is a subject totally within the ken of the federal legislature, limited of course by the mandates of the First Amendment. The Supremacy Clause precludes state regulation of the mails because that power is vested exclusively in the federal legislature. See Milwaukee Pub. Co. v. Burleson, 255 U.S. 407 (1921), and especially Mr. Justice Brandeis's dissenting opinion, id. at 417, and Mr. Justice Holmes's dissenting opinion, id. at 436. To the extent that the use of the first class mails is a privilege or a right, it is a federally-created privilege or right not subject to control by state authority.

If the right to use the mails were to be treated as "property" regulable by the states, it would be private property that could not be commandeered by a State or its agencies except pursuant to the terms of the Fifth Amendment (as applicable to the States through the Fourteenth Amendment), which provides in part: "nor shall private property be taken for public use, without just compensation." Thus, for example, if PGandE were to own an office building in which it housed its business operations, the Commission could not order it to turn over office space within that building for the use of such persons

as the Commission might designate, however essential the office space might be to the supplying of utility services. It is simply not within a state regulatory commission's jurisdiction to direct a utility to devote its property to, or to enter, a private venture such as mailing services. It is the utility-supplying function that the CPUC is authorized to regulate, not the property that is owned by the private corporation.

If PGandE's first-class mail envelopes were somehow considered to be a public forum, the CPUC would be required to license their use on the same terms to any or all who made application for them, on a nondiscriminatory basis and without regard to the subject matter to be covered. If TURN, then also the Church of Scientology; if TURN, then also a candidate for public office; if TURN, then also every competing producer of energy: oil, coal, wood, solar heat, windmills, waterpower. Admittedly, this is an argument ad absurdum. Like the notion that the inside of the envelope is the property of someone other than the mailer, the notion that a first-class mail envelope is a public forum is, if not absurd, certainly novel and abstruse, since such an envelope cannot reasonably be said to be either "public" or a "forum" as the English language is ordinarily used.

Even if PGandE were a government instrumentality, which it is not, that would not create a right of access to its mail by anyone seeking to propagandize or proselytize. The concept of a physical area as a public forum for speech and debate has its origin with public property. It derives from Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939), where Justice Roberts described the concept in this way:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the

> privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order, but it must not, in the guise of regulation, be abridged or denied. Id. at 515-16.

The concept of making public areas available for those who wish to use them for purposes of communication has been expanded by this Court to some privately-owned premises which have been opened and committed to public use by the private owners. See, e.g., Marsh v. Alabama, 326 U.S. 501 (1946); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), which was qualified or overruled in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980). (The last of these cases has been read by Professor Archibald Cox not as an expansion of speech rights but rather as one "accommodating the law of trespass to modern conditions." See Cox, The Supreme Court, 1979 Term: Foreword: Freedom of Expression in the Burger Court, 94 Harv. L. Rev. 1, 48 (1980).)

The mere fact of public ownership, even of a medium of communication, does not create the right to its use or the determination of its use by other than its proprietors. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 129 (1981). Clearly neither the United States Reports nor the Congressional Record need be opened to the expression of views other than those of the Justices in the one case and Congress in the other, although both are publicly owned and certainly arouse a diversity of views among citizen readers and critics. Cf. Lehman v. City of Shaker Heights, 418

U.S. 298 (1974); Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983); Alvins v. Rutgers, State University of New Jersey, 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920 (1968). First-class mail "is not by tradition or designation a forum for public communication." Perry Educ. Ass'n, supra, 460 U.S. at 46; United States Postal Service, supra, 453 U.S. at 131, n.7.

There is no evidence in the jurisprudence of this Court that a State is free to make a public forum for speech out of property that a private owner has never opened to the public for its use. Reliance on Prune Yard for that proposition is misplaced. This Court made it clear that the result there was predicated on the fact that the shopping center parking area in question was not reserved for the private use of the owner. 447 U.S. at 87. This had two implications: first, that the speaker was there by the owner's implied invitation; and second, that not all activities conducted in the space would be deemed to have the sanction of the property owner. Certainly there has been no invitation from PGandE to make use of its mail, nor can there be much doubt that the views expressed in the mailings carry the implied imprimatur of PGandE.

Moreover, to make PGandE publish under its aegis views that are not its own is plainly a violation of the commands of the First Amendment. The First Amendment protects not only the freedom to speak, but the freedom not to speak. Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); cf. Midwest Video Corp. v. FCC, 440 U.S. 689 (1979). It protects the freedom to associate, and the freedom not to associate. Abood v. Detroit Board of Education, 431 U.S. 209 (1977); Elrod v. Burns, 427 U.S. 347 (1976). As this Court said in Wooley, supra, "The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." Wooley, supra, 430 U.S. at 714.

There are two other important distinctions. Prune Yard's speaker was not selected by the State; consequently, there was

no danger of governmental discrimination for or against a particular message. Here there is. And in *Prune Yard*, the Court found that the speaker's use of the shopping center did not substantially interfere with the owner's use of it. Here it does.

It was, and presumably remains, this Court's position that a "state in the exercise of its police power may adopt reasonable restrictions on property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provisions." 447 U.S. at 81. Here not only would there be a taking of PGandE's property without compensation, there is a clear infringement of PGandE's First Amendment rights as well.

IV. THERE IS NO OVERRIDING STATE INTEREST TO JUSTIFY THE COMMISSION'S TRANSGRESSION OF PGandE'S FIRST AMENDMENT RIGHTS.

If what is at issue is commercial speech, it is nevertheless well-established by this Court that censorship of that speech by government requires justification by way of an overriding interest of state. That is the clear lesson of Consolidated Edison and Central Gas and Electric, inter alia. The Commission has certainly not carried its burden of persuasion on that point here. The only justification offered by the Commission for its order that both inhibits PGandE from expressing its views and compels it to express the views of third parties is that the Commission wants a plurality of voices to be heard by PGandE customers. It has, however, long since been made clear by this Court that such a rationalization is itself inconsistent with the First Amendment. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). "[T]he implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this

at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254 (1974). The argument of the Commission thus reduces itself to the proposition that the invasion of PGandE's First Amendment rights is justified by what this Court says the First Amendment forbids.

The contents of PGandE mailing envelopes clearly do not make them subject to prescription or proscription, even by the government of the United States which itself provides the mail services, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), no less by a state public utilities commission, *Consolidated Edison Co. v. Public Service Comm'n*, supra. Since the Commission's avowed objective is to publicize the views of self-appointed consumer advocates under the aegis of a PGandE communication, it fails to meet the first requirement of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, supra, that the restraint directly advance a legitimate and substantial state interest. The restraint, at best, only indirectly advances a state interest. *Id.* at 564. Nor did the Commission show the necessity for this remedy as the most effective and least burdensome method for reaching its goal, as Central Hudson demands. *Ibid.* PGandE's mail is clearly not the only way for the intervenors to reach PGandE customers with whatever messages they may have for them. The U.S. mail, print, and electronic media are open to them as well as to anyone else. Their powers of communication can be fully preserved without limiting those of PGandE in violation of the First Amendment as the CPUC has done here.

CONCLUSION

Amici curiae, Pacific Bell, et al., respectfully submit that, for the reasons heretofore stated, this Court should reverse the judgment below.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Supreme Court of California

BRIEF OF SIERRA PACIFIC POWER COMPANY AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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BRIEF OF SIERRA PACIFIC POWER COMPANY AS AMICUS CURIAE IN SUPPORT OF APPELLANT

Sierra Pacific Power Company ("Sierra Pacific") respectfully submits this brief as amicus curiae in support of Appellant Pacific Gas and Electric Company ("PG&E"). The parties have given their written consent to the filing of this brief, and copies of the letters of consent have been filed with the clerk of this Court.

STATEMENT OF THE CASE

The California Public Utilities Commission ("PUC") has ordered PG&E to insert in PG&E's billing envelopes materials submitted by a private consumer representative organization called Toward Utility Rate Normalization ("TURN"). *TURN v. PG&E*, Decision No. 83-12-047 (Cal. PUC Dec. 20, 1983)[1] *modified by TURN v. PG&E*, Decision

[1]Reproduced in Appendix to the Jurisdictional Statement of Appellant Pacific Gas and Electric Company ("App."), A-1.

No. 84-05-039 (Cal. PUC May 2, 1984). App. at A-45. The PUC order requires PG&E to insert TURN's material in the "extra space" in PG&E's billing envelopes four times per year over the next two years. "Extra space" is defined by the PUC as the space remaining in the billing envelope, after inclusion of PG&E's monthly bill and any required legal notices, which could be filled without having to pay additional postage. App. at A-3.

PG&E sought California Supreme Court review of the PUC's order on the grounds, among others, that the order violated the First and Fifth Amendments to the United States Constitution. By Order dated October 4, 1984, the California Supreme Court, without the full record before it and without hearing, denied PG&E's petition for writ of review. App. at A-73. PG&E appealed to this Court, which noted probable jurisdiction on March 25, 1985.

INTEREST OF THE AMICUS CURIAE

Sierra Pacific is an investor-owned public utility engaged in the generation, purchase, transmission, distribution and sale of electric energy in Nevada and California. The company, incorporated in Nevada, provides electric service in an area part of which is in California and part of which is in Nevada. In addition, the company provides gas and water service in Nevada. It is subject to the jurisdiction of the PUC and the corresponding Public Service Commission of Nevada ("Nevada Commission"). It mails bills to electric customers in both California and Nevada. All of its bills are prepared at one billing center in Nevada without regard to state residence of the customer.

Unless the PUC's order is struck down, the PUC can be expected to issue a similar order directed at Sierra Pacific, and the Nevada Commission can be expected to

take a similar step but with an order reflecting the circumstances of Nevada. Thus, in addition to finding itself required to obey orders which the company believes violate its constitutional rights, Sierra Pacific could be caught facing incompatible directives concerning the same extra space.[2] Even if the Nevada Commission were to issue an order compatible with that of the PUC or were to refrain altogether from issuing an order on use of billing envelopes, Sierra Pacific could be forced to reorganize its entire billing system and to participate in wrangling over the extra space. Thus, as to Sierra Pacific, the PUC's order together with whatever action the Nevada Commission may take could raise separate questions of unlawful interference with interstate commerce.

Sierra Pacific supports PG&E in its appeal from the PUC's order, and requests this Court to strike down that order. Sierra Pacific agrees with PG&E that the PUC's order violates the First Amendment to the United States Constitution for the various reasons presented in PG&E's Jurisdictional Statement and brief, and especially for the reasons set forth herein. In addition, the PUC's order violates the prohibition in the Fifth Amendment against taking private property without just compensation. This issue too was raised by PG&E below and in its Jurisdictional Statement. Jurisdictional Statement at 7-9.

SUMMARY OF ARGUMENT

The PUC's order violates the First Amendment because it impermissibly regulates the content of speech by determining whether particular viewpoints are meritorious, and

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[2]The Nevada Commission has already instituted a rulemaking proceeding to consider whether it has jurisdiction over the extra space and, if so, to consider what rules it should issue. *In Re Investigation of Commission Jurisdiction over Extra Space in Utility Billing Envelopes*, Docket No. 84-1129, (Notice dated Jan. 7, 1985).

by determining whether particular proposals have educational value. The PUC's order fails to meet the constitutional requirements reiterated in *Regan v. Time, Inc.*, 52 U.S.L.W. 5084, 82 L. Ed. 2d 487 (1984). The PUC cannot rely on the proposition that under the First Amendment the state may lawfully fix a time, place or manner for speech so long as the state refrains from regulating content.

Next, the PUC cannot rely on the proposition that under the First Amendment speech content may indeed be regulated if a compelling state interest is satisfied, and if, in addition, there are no more narrowly tailored, less drastic means to satisfy that interest. The PUC's declared interest, of assuring the fullest possible consumer participation in rate proceedings and the most complete understanding of energy-related issues, is not "compelling" within the meaning of this Court's First Amendment decisions. Even if the declared interest were compelling, the granting of access to billing envelopes to partisan groups is at most a clumsy method of satisfying that interest. Moreover, there are more narrowly tailored and less drastic means by which that interest can be served.

Finally, the PUC cannot rely on the proposition that the envelope space is a "nonpublic forum" to which the state may, without violating the First Amendment, regulate access for purposes of speech. The proposition does not extend to private property, including the utility's billing envelopes. *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 49-50, n.9 (1983). A private utility's billing envelope, including extra space, is its private property and customers do not have any legal or equitable interest therein. *Board of Public Utility Commissioners v. New York Telephone Company*, 271 U.S. 23, 32 (1926). Further, the PUC's authority does not extend to allow it to create a "nonpublic" forum in the utility's private property.

ARGUMENT

I

THE PUC'S ORDER VIOLATES THE FIRST AMENDMENT BECAUSE IT IMPERMISSIBLY REGULATES THE CONTENT OF SPEECH BY DETERMINING WHETHER PARTICULAR VIEWPOINTS ARE MERITORIOUS

The First Amendment is "hostile" to content-based regulation of speech. *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 537 (1980). This Court has recently reaffirmed that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 52 U.S.L.W. 5084, 82 L. Ed. 2d 487, 494 (1984). That decision reaffirmed that the government may impose time, place, and manner regulations for speech provided such regulations are in no way based on the content or subject matter of the message; the regulations must be content-neutral. *Id.*

When the PUC originally invited TURN to request use of the extra space, the PUC admitted that orders such as the one it ultimately issued would face "considerable First Amendment problems." App. at A-4, *quoting Application of Pacific Gas and Electric Company*, Decision No. 93887 (Cal. PUC Dec. 30, 1981) *partially reprinted in* App. at A-63 *et seq.* In an attempt to overcome those problems, the PUC asserted that its order was a reasonable time, place, or manner restriction that did not involve regulation of the content of speech. App. at A-21. According to the PUC, "[t]he proposal does not require the Commission to look at content at all . . . the proposal as we adopt it is neutral as to content of the parties' messages and, therefore, meets [the] subject matter standard." *Id.* In the same vein, the PUC asserted that "[i]t was not our intent then, nor is it now, to involve ourselves in judging the relative merits of the speech of different factions." *Id.* at A-8.

Despite these assertions the PUC clearly states elsewhere in the order its intention to evaluate speech content:

> Should other proposals [for use of the extra space] be brought before us, *we will consider the* feasibility and *benefits* of each at that time. *If we find that these proposals are meritorious*, we could order that extra space be made available for the new program. . . .

Id. at A-19 (emphasis added). By the PUC's own admission, it determined that

> TURN's proposals are *meritorious*. Under each proposal, residential ratepayers . . . would be given an oportunity to be informed of and to support, advocacy efforts on their behalf through use of the extra space . . . [w]e believe that this would be *an appropriate* . . . use of the extra space.

Id. at A-16 (emphasis added). In considering whether to allow TURN's inserts into the extra space, the PUC considered the *"positions which TURN takes* regarding PG&E" and considered whether those positions are shared by ratepayers. App. at A-15 (emphasis added). The PUC specifically considered TURN's view that PG&E's "rate of return and valuation of rate base [should be kept] relatively low." *Id.* Next, the PUC examined the positions TURN takes "[a]s to issues such as rate design and energy conservation subsidies." *Id.*

Thus, the PUC's order on its face demonstrates that the PUC granted access to TURN based on the positions which TURN takes and the viewpoints which TURN espouses. Government decisions as to speech which are based on speakers' positions or viewpoints on issues are decisions unconstitutionally based on the content of speech.

That the PUC has by its order undertaken to regulate speech content and to play the role of censor, despite its protests to the contrary, is evidenced by the fact that the PUC has already begun to make content-based decisions respecting access to PG&E's billing envelopes. In *Committee of More Than 1 Million Taxpayers to Save Prop. 13 v. Pacific Gas and Electric Company et al.*, Decision No. 84-10-062 (Cal. PUC Oct. 17, 1984) *reprinted in* App. at A-157, the PUC excluded complainant Committee from the extra space because the PUC ascribed insufficient merit to the Committee's proposal to "include informational inserts" regarding Proposition 36, a referendum on the November, 1984 ballot in California. *Id.* at A-159, A-161. The Committee had stated its position on Proposition 36 to the PUC and had requested access to the extra space to communicate information regarding that position. *Id.* at A-158. The PUC evaluated the Committe's stated position and then considered whether the ratepayers would be benefited enough by the Committee's proposal to warrant inclusion of the insert. *Id.* at A-158, A-161. The PUC decided to exclude the Committee's insert from the extra space. *Id.* at A-161. The PUC based its order denying the Committee access to the billing envelopes on the positions the Committee was taking and the viewpoints the Committee was espousing.

If the PUC's order is allowed to stand, other groups will clamor for use of the extra space. Their viewpoints will span a wide breadth of opinion on a potentially limitless list of issues ranging from elimination of private ownership of public utilities to creation of special rates according to the needs of particular industries or value of end use.[3] Thus, the PUC's order requires it to continue making content-based evaluations in the future.

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[3]The PUC's regulation and content in this case is especially troubling because by requiring TURN's materials to be inserted in the utility's billing envelope, those materials enjoy a stamp of legitimacy which would otherwise be absent. The result is that, through the government's choice of what groups may use a utility's envelopes and for what purpose, the government is in the position of shaping and directing public debate.

II

THE PUC'S ORDER VIOLATES THE FIRST AMENDMENT BECAUSE IT IMPERMISSIBLY REGULATES THE CONTENT OF SPEECH BY DETERMINING WHETHER PARTICULAR PROPOSALS HAVE EDUCATIONAL VALUE

The PUC's order violates the First Amendment by making an impermissible assessment of the educational value of speech. This Court held in *Regan v. Time, Inc.* that it is unconstitutional for the state to make determinations based on the educational value of a speaker's message. 52 U.S.L.W. 5084, 82 L. Ed. 2d at 494. In *Regan*, this Court recognized that

> [*a*] *determination concerning* the newsworthiness or *educational value . . . cannot help but be based on the content . . . and the message* it delivers. . . . [O]ne will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted in the other is not.

Id. (emphasis added).

One of the PUC's stated purposes for its order is to educate consumers. Specifically, the PUC order adopted the PUC's justification in its earlier "UCAN" decision in which the PUC declared that one reason for ordering inclusion of certain material in the billing envelope was to assure "the *most complete consumer understanding* possible of energy-related issues." *Center for Public Interest Law v. San Diego Gas & Electric Co.*, Decision No. 83-04-020 (Cal. PUC Apr. 6, 1983) *reprinted in* App. at A-90, A-103 ("UCAN decision") (emphasis added). *See* App. at A-22.[4] Whenever the PUC decides which proposals for use of the extra space are "meritorious" enough to warrant inclusion in the utility's billing envelopes, it is deciding which proposals have sufficient educational value for the consumers' "benefit." *See* App. at A-19.

[4] In relying on the above quoted language in the UCAN decision the Commission quoted the above words but left out the word "consumer," presumably inadvertently. The UCAN decision declares that the goal is to assure "the most complete *consumer* understanding." Id. at A-103 (emphasis added).

The statutory provision held unconstitutional in *Regan v. Time, Inc.* was one allowing certain speech if it was for an educational purpose and disallowing it if it was not. 82 L. Ed. 2d at 492. The PUC admits that it will assess the benefits and merits of material proposed for the extra space, App. at A-19, and will allow inclusion of that material if it sufficiently serves the state's purpose of educating consumers. This is indeed a case in which the PUC impermissibly regulates speech and plays the role of educational censor. As this Court held in *Regan v. Time, Inc.*, such regulation of speech cannot be tolerated under the First Amendment. 82 L. Ed. 2d at 494.

III

THE PUC'S ORDER VIOLATES THE FIRST AMENDMENT BECAUSE THE PUC HAS NOT SHOWN A COMPELLING STATE INTEREST PURSUED BY NARROWLY TAILORED MEANS

The government may regulate speech without violating the First Amendment (a) provided such regulation is necessary to further or protect a compelling state interest and (b) provided the regulation is narrowly tailored to accomplish that result and (c) provided there is no alternative which is less drastic. *Wooley v. Maynard*, 430 U.S. 705, 715-717 (1977). *See Consolidated Edison v. Public Service Commission, supra*, 447 U.S. at 535.

The PUC's asserted interest is not compelling. The PUC sets forth the state's interest as follows:

> The State interest, of course, is the assurance of the fullest possible consumer participation in [PUC] proceedings and the most complete consumer understanding possible of energy-related issues.

App. at A-103. *See* Note 4, *supra*.

It strains credulity that such claimed interest is "compelling." The PUC's constitutional and statutory function is not to obtain assurance of full consumer participation, nor to educate ratepayers on rate issues. While those goals may be desirable, the PUC's lawful function is to issue orders to assure adequate utility service at reasonable rates.

In all its seventy years, the PUC has fixed rates without bill inserts from consumers and without mass attempts to educate the public. It has pursued an open-door policy in allowing interested consumers and consumer groups to appear and participate in rate proceedings. It has developed a staff which now numbers over 700, many of whom are trained as experts in economics, engineering, and rate design. The PUC draws heavily upon their knowledge. In sum, the PUC's experience and resources enable it to issue orders assuring adequate service at reasonable rates.[8]

Even if it were accepted that the PUC's asserted interest is compelling, the PUC's order is unlawful because there are more narrowly tailored and less drastic measures available to encourage consumer participation in PUC proceedings and to educate consumers on energy-related issues. If the PUC really wanted to accomplish "the most complete consumer understanding possible" it would certainly not want to rely on bill inserts from partisan groups. On the contrary, it would itself conduct seminars, write informative papers, give lectures, hold debates and perhaps even conduct educational courses.

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[8]The PUC's order enhances the relative voice of TURN and restricts that of PG&E, which is denied access to the extent TURN's materials are sent out in the extra space. It is unconstitutional under the First Amendment for the government to enhance one voice relative to another, *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), and such an unconstitutional objective cannot be a "compelling state interest."

Current PUC practice already adequately encourages consumer participation in PUC proceedings. The PUC requires public notice of hearings and accepts appearances and evidence on a liberal basis. In addition, under the federal Public Utility Regulatory Policy Act (PURPA), 16 U.S.C. § 2623, *et seq.*, and California Public Utilities Code Section 1801, the PUC has power to order utilities to pay fees and expenses to participants in rate cases when a significant contribution to the rate case can be shown. Such awards have been made to various consumer groups, including TURN. App. at A-15 n.5. Unlike the access to billing envelopes which the PUC grants by its order, fees and expenses awarded for participation in rate hearings bear direct relation to such participation and do not infringe First Amendment rights.

In sum, the PUC has broad powers and unique capabilities to encourage ratepayer participation in rate hearings and to educate and inform the public, all without infringing First Amendment rights.

IV

THE PUC'S ORDER VIOLATES THE FIRST AMENDMENT BECAUSE IT IMPROPERLY ATTEMPTS TO CREATE A NONPUBLIC FORUM IN THE UTILITY'S PROPERTY

There are three types of forums which this Court has recognized in its First Amendment cases. First, there are "traditional" public forums such as "streets and parks which 'have immemorially been held in trust for the use of the public for purposes of assembly, communicating thought between citizens, and discussing public questions.'" *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983), *quoting Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). The extra space is clearly not a traditional public forum, since the space inside the billing envelope has never been used by anyone but PG&E.

The second type of forum is the "designated public forum." It "consists of *public* property such as a city auditorium which the State has opened for use by the public as a place for expressive activity." *Perry, supra,* 460 U.S. at 45 (emphasis added). The PUC has recognized and stated to this Court that "this is not a 'public forum' case." *Motion to Dismiss* at 20, 22. Similarly, in *Committee of More Than 1 Million (etc.), supra,* App. at A-160, the PUC stated that it "did not intend to create a public forum" by its order regarding use of the extra space.

Third, there is the "nonpublic" forum. It consists of *public* property to which the government may give access for particular speech or other expressive activity, even though such public property "is not by tradition or designation a forum for public communication." *Perry, supra,* 460 U.S. at 46 (emphasis added).

The PUC's claim that the extra space is a nonpublic forum subject to its regulation is a post-hoc rationalization offered by the PUC in its attempt to defeat PG&E's appeal to this Court. *See Motion to Dismiss* at 20. It is a rationalization which produces an unconstitutional result.

A. There Cannot Be A Nonpublic Forum in the Billing Envelope, Including Any Extra Space, Because It Is the Utility's Property

Only *public* property may be a nonpublic forum to which the government may grant access. For example, in *Perry, supra,* 460 U.S. at 46-47, the government granted to one group but not another access to a government-owned interschool mail system. Similarly, the government granted access, for purposes of speech, to one speaker but not another where the property to which access was sought was a military base. *Greer v. Spock,* 424 U.S. 828, 838 (1976). *Cf. United States Postal Service v. Council of Greenburgh Civic Associations,* 453 U.S. 114 (1981)

(letterbox owner's commitment of letterbox to Postal Service's nationwide system for mail delivery, in exchange for Postal Service's agreement to deliver and pick up mail, did not transform letterbox into a limited public forum).

The PUC's order granting TURN access to the extra space violates the First Amendment because the property in question is owned by the utility, not by the state. This Court has consistently held that by paying bills for service, utility customers do not acquire any interest in property purchased by the utility for the conduct of its business. Thus, in *Board of Public Utility Commissioners v. New York Telephone Company,* 271 U.S. 23 (1926), this Court said that "[b]y paying bills for service [customers] do not acquire any interest, legal or equitable, in the property used for their convenience. . . . Property paid for out of moneys received for service belongs to the company. . . . Customers pay for service; not for the property used to render it." *Id.* at 32. As the Court stated in *United R. & Electric Co. v. West,* 280 U.S. 234 (1930), ". . . the property of a public utility, although devoted to the public service and impressed with a public interest is still private property; . . ." *Id.* at 249, *overruled on other grounds, Federal Power Com. v. Hope Nat. Gas Co.,* 320 U.S. 591, 606-607 (1944) (overruling previous decision as to proper method for calculating depreciation).

Consistent with the above decisions, this Court's opinion in *Consolidated Edison v. Public Service Commission,* 447 U.S. 530 (1980) assumes in the course of its First Amendment analysis that utility billing envelopes belong to the utility. *Id.* at 540. In that case, this Court contrasted the defendant's attempted regulation of utility bill inserts with cases where private parties sought to use public property and observed that the utility sought "merely to utilize *its own billing envelopes* to promulgate its views."

Id. at 539-540 (emphasis added). This Court in the *Consolidated Edison* case which, as here, involved First Amendment rights with respect to inserts in utility billing envelopes, expressly distinguished the First Amendment forum cases. *Consolidated Edison, supra,* 447 U.S. at 539-540. *See Perry, supra,* 460 U.S. at 49-50, n.9.

This Court's most comprehensive analysis of First Amendment forum principles is found in the *Perry* case. The Court enunciated in detail the principles that govern requests for access to property for the purpose of engaging in speech or other expressive activity on that property. All of the instances in which the Court declared a nonpublic forum might be found involved government-owned property. *Perry, supra,* 460 U.S. at 49 n.9. A nonpublic forum is "*public property*" which is not a traditional or designated public forum, but which the State may reserve for communicative purposes. *Perry, supra,* 460 U.S. at 46 (emphasis added). The necessary prerequisite of a nonpublic forum is that the property to which access is sought must be public property. *Id.*

In its findings of fact, the PUC itself described what TURN sought as "access to the PG&E billing envelope." App. at A-30. The PUC admits the billing envelopes to which access is sought are the utility's property, since the PUC "did not adopt the idea that the envelope itself is ratepayer property. . . ." App. at A-2, A-3. The PUC has further admitted before this Court that the utility is the "*sole* owner of its customer list." *Motion to Dismiss* at 18 (emphasis added). In effect, the PUC's order forces the utility to accept third party intrusions into property which the PUC admits is owned by the utility in order to communicate a message to utility customers on a list which the PUC admits is solely owned by the utility.

To summarize, a necessary prerequisite to a nonpublic forum is absent because the property to which access is sought is not public property. Therefore, the PUC's order,

as characterized by its post-hoc rationalization offered to this Court, is an unconstitutional attempt to create a nonpublic forum in the utility's billing envelope.

B. The Envelope Is Not So Controlled By the PUC As To Allow It To Create a First Amendment Forum in the Extra Space

The PUC has suggested that its control over utilities allows it to create a nonpublic forum in the billing envelope. *Motion to Dismiss* at 21. This argument is unpersuasive.

This Court has held in one case that certain private property may be so controlled by government that government may *deny* third parties' requests for access to the property. *Council of Greenburgh, supra,* 453 U.S. 114 (Postal Service could deny third party requests for access to privately owned letterboxes). That case is not, however, authority to support the PUC's action.

Council of Greenburgh involved a special situation. The Court in that case found justification for the Postal Service's authority to *deny* third party access to private letterboxes in the unique historical role of the government in mail delivery. The federal government is expressly authorized in the Constitution to govern the mails. U.S. Const. Art. I § 8. Moreover, this Court established over a century ago that the power vested in " 'Congress embraces the regulation of the entire Postal System of the country [including] the right to determine what shall be excluded'." *Council of Greenburgh, supra,* 453 U.S. at 126, *quoting Ex parte Jackson,* 36 U.S. 727, 732 (1878). As this Court stated, the private letterbox owner "agrees to abide by the Postal Service's regulations in exchange for the Postal Service agreeing to deliver and pick up his mail." *Id.*

The present case is in stark contrast to the *Council of Greenburgh* case. The source upon which the PUC purports to rely for its order is not an express constitutional

or statutory mandate but a general authority to regulate utilities. Utilities do provide service in a field affected with a public interest and are regulated to ensure that service is adequate, but utilities are nevertheless private companies owned by the shareholders. They have dedicated their property to providing utility service, but not to providing a forum for speech. The authority of the PUC is comprehensive in regulating utility service, but does not extend to force the utility to provide a forum for speech.

CONCLUSION

The PUC's order if allowed to stand will provide the impetus for the PUC and other state regulatory bodies to issue similar orders directed at other utilities. Because the order violates the First Amendment, and the Fifth Amendment as well, it should be struck down.

Respectfully submitted,

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On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION

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QUESTION PRESENTED

Whether the Order of the California Public Utilities Commission violates the First Amendment rights of the Pacific Gas and Electric Company by requiring the utility to foster and promote the views of a private organization by inserting that organization's fund-raising literature into the billing envelopes mailed to the company's customers.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF AMICUS CURIAE, WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared as *amicus curiae* in a number of cases dealing with the rights of businesses and individuals such as *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980). In addition, WLF has appeared before regulatory agencies which have sought to restrict the rights of businesses. In one such rulemaking proceeding which is implicated by a decision in this case, WLF opposed rules promulgated by the Federal Election Commission which would compel corporations and unions to allow political candidates, even those of the American Communist Party, to use corporate facilities and space for campaign purposes if their opponent had appeared on the corporate premises or at a corporate meeting or union convention. 11 C.F.R. § 114.4(a)(2). WLF believes that such intrusions by the government, including the Order by the California Public Utilities Commission in this case, are a dangerous infringement on basic First Amendment rights.

STATEMENT OF THE CASE

For purposes of judicial economy, *amicus* adopts by reference the Statement of the Case as presented by appellant Pacific Gas and Electric Company (PG&E) in its Jurisdictional Statement and brief on the merits.

In brief, the California Public Utilities Commission (CPUC) has determined that the "extra space" inside the billing envelopes sent by PG&E to its customers belongs to the ratepayers. "Extra space" is defined as the space remaining in the billing envelope, after inclusion of the bill and legal notices, for inclusion of other materials such that the extra weight will not result in any additional postage. CPUC then ordered that PG&E must allow a consumer group, Toward Utility Rate Normalization (TURN), to insert its fund-raising literature in that extra space four times a year.

While only the First Amendment issue has been directly raised in this case, implicit in this case is the question of the ownership of the extra space. *Amicus* submits that the extra space is owned by PG&E since PG&E, in effect, created that space by keeping the weight of the inserted materials below one ounce. PG&E could tomorrow lawfully increase the weight of the billing information by either increasing the weight of the paper stock used, or by increasing the print size, which would assist consumers who have poor eyesight, such that more paper is used. If the CPUC can control the use of the "extra space", then CPUC could create more extra space for use by TURN or others, by requiring PG&E to use lighter paper stock or smaller printing. Regardless of the ownership of the extra space, *amicus* nevertheless submits that the First Amendment issue is an important one.

SUMMARY OF THE ARGUMENT

The First Amendment rights of PG&E are violated by the CPUC Order requiring PG&E against its will to send out the fund-raising literature of a private organization. The Commission has failed to satisfy constitutional standards by failing to show that the Order serves a compelling governmental interest, is content-neutral, and is narrowly drawn to serve those interests. Accordingly, the Order must be struck down as violative of the First Amendment.

ARGUMENT

I. PG&E, OR ANY OTHER BUSINESS, HAS A FIRST AMENDMENT RIGHT NOT TO FOSTER AND ASSIST IN RAISING FUNDS OF A PRIVATE ORGANIZATION AND CANNOT BE COMPELLED TO INSERT THAT ORGANIZATION'S LITERATURE IN THE COMPANY'S BILLING ENVELOPES SENT TO ITS CUSTOMERS.

It is clearly established that appellant PG&E, as well as any other corporate entity, is entitled to First Amendment freedoms. *First National Bank of Boston v. Bellotti.* 435 U.S. 765 (1978); *Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530 (1980). Accordingly, the question of whether or not appellant's First Amendment rights have been violated by the order of appellee Public Utilities Commission compelling PG&E to assist in promoting TURN or any other group can be answered by this Court's other First Amendment cases. *Amicus* submits that the Commission's order unconstitutionally forces PG&E to foster and promote the views of a third party with which PG&E disagrees and is in direct conflict with this court's ruling in *Wooley v. Maynard,* 430 U.S. 705 (1977).

In *Wooley,* the Court addressed an issue almost identical to the case at bar, namely, whether a person was required to display on his automobile objectionable language contained on the state's license plate ("Live Free or Die"). As the *Wooley* Court stated:

> We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that State may not do so.

430 U.S. at 713.

The Court's holding in *Wooley* is dispositive of this case. Like the plaintiff in *Wooley,* PG&E is unconstitutionally forced "to participate in the dissemination of an ideological message by displaying it on [in] his private property in a manner and for the express purpose that it be observed and read by the public." *Id.*

This Court correctly reasoned in *Wooley* that the First Amendment not only forbids the state from restricting political or ideological speech, but also "guarantee[s] the concomitant right to decline *to foster* such" speech. *Id.* at 714 (emphasis added). In addition, the *Wooley* Court noted that the "passive act of carrying the state motto" is not as serious an infringement as compelling an affirmative act of a flag salute, but "the difference is essentially one of degree." *Id.* at 715. The Court stated, "[W]e are faced with a state measure which forces an individual . . . to be an *instrument for fostering* public adherence [support] to an ideological point of view he finds unacceptable." *Id.* at 715 (emphasis added).

The *Wooley* Court, noting that the statute required the objecting party to "use their private property" to promote the State's message, held that "[t]he First Amendment protects the right of individuals . . . *to refuse to foster*" objectionable ideas or speech. *Id.* at 715 (emphasis added).

Clearly, the order of the Commission infringes on PG&E's First Amendment right to refuse to use any of its property "to foster" or serve as "an instrument for fostering" the views of another organization and to serve as a fund-raising mechanism for that group. This is so whether the PG&E property is considered to consist of only the billing envelopes, or other PG&E property or resources such as the extra space, the labor and overhead involved in inserting the material, and other costs regardless of whether some of the costs may be reimbursable. *See Abood v. Detroit Board of Education,* 431 U.S. 209 (1977)).

Amici submit that the Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) is inapplicable to the instant case. In *PruneYard*, high school students set up a card table in a corner of PruneYard shopping center's courtyard seeking support against a United Nation's resolution against "Zionism." *Id.* at 77. The Court first noted that the record did not indicate any objection to this activity by PruneYard's patrons or customers.[1] *Id.*

The Court distinguished *PruneYard* from *Wooley* in three respects. First, and "[m]ost important, the shopping center *by choice of its owner*, is not limited to the personal use of the owners." *Id.* at 87 (emphasis added). Instead, it is "open to the public to come and go as they please." *Id.* In the instant case, however, PG&E has always chosen to use the billing envelopes to its own use and not for the public to use as it pleases. For that reason alone, this case is clearly more like the situation in *Wooley* than in *PruneYard.*

The second distinguishing fact articulated in *PruneYard* was that no specific message was dictated by the State to be displayed as in *Wooley*. However, this distinction is without merit since in either case, the state is compelling someone to foster or promote speech of someone else that he objects to. The principle is the same regardless of the identity of the speaker of the objectionable speech. Otherwise the *PruneYard* case might have been decided differently if the students were distributing literature not of their own writing, but, for example, a

[1] Although the bill inserts of TURN solicitations have not yet begun, *amici* submit that some customer objection to the TURN literature is likely. Further, if TURN were to include its own return envelope for contributions, which they may do, customers may inadvertently place their check for PG&E services into the wrong envelope, and thereby cause further confusion and resources to be expended by PG&E.

copy of a U.N. Resolution supporting Israel drafted by the United States Department of State.

Thirdly, the *PruneYard* Court distinguished *Wooley* by noting that the owner can disavow the message by going to the expense of "posting signs" in the area where the speakers are located. However, Justice Rehnquist, who wrote the *PruneYard* decision, noted in his dissent in *Wooley* that the owners of cars "could place on their bumper sticker explaining in no certain terms that they do not" agree with the "Live Free of Die" motto on the license plates. 430 U.S. at 722. In every case imaginable, the party forced to publicize the message of another could disavow its association with the messenger. Thus, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the newspaper could have easily printed a disclaimer disavowing the contents of a political candidate's reply which Florida law required to be published. Yet this Court held such a law to be unconstitutional even if the publisher faces no additional costs in complying with the reply law. *Id.* at 258. It should be remembered that technically speaking, newspapers, as a tangible object, have no First Amendment rights. It is the right of the publisher or any person or entity to publish a newspaper, newsletter, or other communication. Concomitantly, the First Amendment protects publishers or any other corporation or individual, from being forced to publish or transmit any one else's communication. Thus, even if the law in *Tornillo* required a political candidate to print his own reply on a flyer with disclaimers and to reimburse the newspaper for simply inserting the flyer in the newspaper, this Court would have similarly struck down such a law.

Consequently, the only relevant distinction between *Wooley* and *PruneYard* is the first and "most important" one noted, namely, the owner's decision to allow the public to use his space. As discussed, that distinction is inapplicable here. As Justice Powell stated in his concurring opinion in *PruneYard:*

> I do not interpret our decision today as a blanket approval for state efforts to transform privately owned commercial property into public forums. Any such state action would raise substantial federal constitutional questions not present in this case.

447 U.S. at 101.

Unless the decision of the Commission is reversed, the state would impermissibly transform private property (i.e., the envelopes or extra space) into a public forum or as a transmitter of objectionable messages.

II. THE STATE'S RESTRICTION ON PG&E'S FIRST AMENDMENT RIGHTS DOES NOT SATISFY THIS COURT'S TEST FOR REGULATING SPEECH.

While it is clear that PG&E's First Amendment rights are infringed by the Commission's order, the remaining question is whether the infringement of those rights can be constitutionally justified. *Wooley v. Maynard*, 430 U.S. at 716. *Amicus* submits that the reasons for such infringement cannot pass constitutional muster because the state has not demonstrated a compelling governmental interest furthered by the infringement, that the reasons are not content-neutral, and that regulatory measures designed to further the alleged governmental interest is not narrowly tailored or drawn to meet those interests. *City Council of Los Angeles v. Taxpayers For Vincent*, —— U.S. ——, 104 S.Ct. 2118, 2129 (1984); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

A. The Governmental Interest Asserted Is Not A Compelling One.

The only state interest identified in the Commission's order is "the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." This goal, however laudable, has never been demonstrated to be a compelling one. There has been no evidence that consumer participation and understanding has not achieved

a sufficiently high level such that CPUC proceedings were found to suffer in any significant way. Obviously, if all 3.7 million consumers of PG&E were to attend or testify at a CPUC hearing or proceeding, the Commission's work would come to a grinding halt. Thus, it is in CPUC's best interest *not* to have full participation by every customer in CPUC proceedings. Thus, the interest of assuring the "fullest possible" participation is a vague and undefined governmental interest that cannot justify an infringement on First Amendment rights.

Furthermore, there has been no showing that consumer interests are under-represented in CPUC proceedings, or that the marginal difference between their current level of representation by CPUC, TURN, and other groups, and some hypothetical higher level of representation constitutes a "compelling" governmental interest.

As for the other interest of assuring "the most complete understanding possible of energy-related issues," there also has been no showing that the current understanding is so deficient as to cause any significant problems with CPUC proceedings. What does CPUC mean exactly by assuring "the most complete understanding possible of energy related issues?" Many issues are "energy-related" ranging from the political situation in the Mid-East to the use of photo-voltaic cells. Surely, this vague governmental interest can hardly be considered a sufficiently compelling one to justify the state's infringement on First Amendment rights.

The burden is on the State to demonstrate a compelling government interest. *See Elrod v. Burns*, 427 U.S. 347, 362 (1976). The state has simply not met its burden of demonstrating a compelling governmental interest by merely suggesting some vague platitude or objective.

B. The Order Is Not Narrowly Drawn To Serve The Governmental Interests.

Even assuming, *arguendo*, that the interests articulated, *i.e.*, assuring the fullest possible consumer participation

and an understanding of energy-related issues, are compelling, it is clear that the order in question is not narrowly drawn to meet those goals.

In the first place, there is absolutely no assurance that TURN will use the extra space to further the objectives. CPUC has made it clear that it will not regulate the content of the material sent by TURN. TURN is free to communicate on any issue it wants or raise money in any way it chooses. It could, for example, offer premiums or devise other fund-raising devices not otherwise violative of state or federal law. Nothing prevents TURN from selling or leasing all or part of the space in its literature to commercial advertisers, thereby assuring itself of money "up front" rather than incurring huge costs for printing 3.6 million brochures in the hope that the public will respond sufficiently to defray some or all of the costs, or provide TURN with a profit. However, it is entirely possible that all such costs may *not* be recouped by TURN after their mailing and that the net amount available for TURN for activities before CPUC proceedings could well be less rather than more, thereby *decreasing* the level of consumer representation. Clearly, this would not advance the alleged governmental interest. The only way that the alleged governmental interest of "assuring" further participation will be realized, is to "assure" TURN that its fund-raising efforts will be successful. Obviously, CPUC does not appear to be willing to guarantee TURN's fund-raising efforts.

Even assuming that TURN realizes a profit from their fund-raising efforts (*i.e.*, funds raised exceed printing costs and other costs imposed by CPUC such as accounting and preparing an annual report) there is no guarantee that those profits will necessarily be transformed into greater consumer participation before CPUC proceedings. The CPUC Order, Paragraph 5(f) states that "[f]unds received shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E." As noted earlier, presumably the order would

mean only *net* funds received after subtracting all the costs associated with the fund-raising efforts. If the order were taken literally to mean gross funds, TURN could easily argue that the fund-raising costs incurred were "related to ratepayer representation" and thus, a proper expenditure of those funds. However, there is nothing in the Order to prevent TURN from using the funds received in place of funds currently expended by TURN. Thus, they could substitute those funds raised by the Commission's order for funds currently allocated by TURN for Commission proceedings. In that case, the governmental interest is not advanced any more than what it originally was without the Order.

Furthermore, even if there were a profit and the funds generated were used in addition to other funds already allocated by TURN, there is no guarantee that the additional funds would necessarily increase ratepayer representation before CPUC. For example, TURN could merely increase the current salaries of its officers, staff, and consultants without any concomitant increase in ratepayer participation. Or they could use the money for larger office space or other overhead and justify it on the grounds that the expenses are "related" to Commission proceedings.

In short, the Order is not narrowly drawn to advance the compelling governmental order asserted. Other methods exist which are more appropriate for promoting consumer representation such as reimbursement for attorneys' fees and costs to those groups who participate in proceedings and whose participation CPUC found to be useful in their deliberations. Only in such a scheme is the CPUC "assured" that the governmental interest is promoted. Accordingly, the Order is not narrowly drawn.

C. The Commission's Action Was Impermissibly Based on the Content of Speech.

Amicus submits that the Commission's action also fails to satisfy the test of content-neutrality in regulating

speech. Admittedly, the Order on its face states that the Commission will not examine the content of either TURN's or PG&E's literature. However, it is clear that in order to reach the decision granting TURN access to PG&E's envelopes, the Commission improperly engaged in examining the content of PG&E's literature. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 537.

If, however, CPUC were to demonstrate that its action was not content-based, then CPUC's action has failed to demonstrate that the governmental interest is furthered since, as noted earlier, TURN could use the space for commercial advertising or other purposes not related to energy issues. In short, CPUC cannot have it both ways. Either its action was premised on the content of speech, or if it is not, the Order does not advance the governmental interest asserted.

CONCLUSION

For the foregoing reasons, *amicus* submits that the actions of the CPUC in forcing PG&E to foster the views of a private organization by requiring PG&E to disseminate the fund-raising literature of that group is violative of the First Amendment. As a matter of constitutional law and the public interest, the decision by CPUC must be struck down.

Respectfully submitted,

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October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From The Supreme Court Of California

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION

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No. 84-1044

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—o—

On Appeal From The
Supreme Court Of California

—o—

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION

—o—

With the written consent of all parties, Mountain States Legal Foundation (MSLF or Foundation) respectfully submits this brief as *amicus curiae* in support of appellant, Pacific Gas & Electric Company (PG&E).[1]

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[1]MSLF has filed the written consents of all parties with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, membership, public interest legal foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation seeks to protect the interests of its members and those of the public from overly intrusive, unnecessary, and costly governmental regulation.

The Foundation is strongly committed to limiting the role of public utility commissions to their traditional functions of setting reasonable rates and assuring adequate services. The Foundation has been a party in numerous public utility proceedings in order to confine the actions of utility commissions to only those authorized by law.[2]

The instant case is of particular importance to MSLF and its members because the Foundation represents the

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[2]MSLF has participated in many cases in which utility commissions have tried to expand their powers. *See, e.g., Mountain States Legal Foundation v. New Mexico State Corporation Commission*, 687 P.2d 92 (N.M. 1984); *Montana Power Co. v. Public Service Commission*, 671 P.2d 604 (Mont. 1983); *Mountain States Legal Foundation v. Utah Public Service Commission*, 636 P.2d 1047 (Utah 1981); *Idaho Public Utilities Commission Consideration of Essential Needs Rates*, No. P-300-16 (Idaho Public Utilities Commission Sept. 1, 1981); *Mountain States Telephone & Telegraph Co. v. Public Service Commission*, 634 P.2d 181 (Mont. 1981); *Mountain Fuel Supply Co. v. Utah Committee of Consumer Services*, 595 P.2d 871 (Utah 1979), *cert. denied*, 444 U.S. 1014 (1980); *Mountain States Legal Foundation v. Colorado Public Utilities Commission*, 590 P.2d 1945 (Colo. 1979); *Becker Industries v. Idaho Public Utilities Commission*, No. 13267 (Idaho Supreme Ct., stipulated dismissal Aug. 17, 1979); and *In re Utah Public Service Commission Generic Ratemaking Proceedings*, No. 77-999-09 (Public Service Commission of Utah Feb. 2, 1979).

Utility Shareholder Association of Nevada, Inc. before the Public Service Commission of Nevada on issues identical to those pending before this Court.[3] The Foundation believes that the expansion of utility commissions' powers to include the authority to give third parties access to utility billing envelopes infringes upon cherished first amendment freedoms and adversely affects the public interest.

—o—

STATEMENT OF THE CASE

On December 20, 1983, the Public Utilities Commission of California (CPUC or Commission) ordered PG&E to give a consumer group, Toward Utility Rate Normalization (TURN), access to the "extra" space[4] in the utility's billing envelope four times a year for two years. CPUC Decision No. 83-12-047 at A-32. This order was based on a CPUC finding, in an earlier proceeding, that the "extra" space in PG&E's billing envelope belonged to

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[3]On February 20, 1985, the Utility Shareholder Association of Nevada, Inc. was granted intervention by the Public Service Commission of Nevada in *In re Investigation of Commission Jurisdiction Over Extra Space In Utility Billing Envelopes*, Docket No. 84-1129.

[4]The CPUC defined "extra space as the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other material up to such total envelope weight as would not result in any additional postage cost." CPUC Decision No. 83-12-047 at A-3. (All page references to CPUC decisions are keyed to the Appendix To The Jurisdictional Statement of Appellant Pacific Gas & Electric Company.)

the ratepayers. CPUC Decision No. 93887 at A-72. On May 2, 1984, the CPUC issued Decision No. 84-05-039, modifying Decision No. 83-12-047 and denying all requests for a new hearing. PG&E's request for review to the Supreme Court of California was also denied without comment on October 4, 1984.[5]

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INTRODUCTION AND SUMMARY OF ARGUMENT

The very nature of regulatory commissions, including public utility commissions, dictates that they will seek to expand their regulatory activities. As a result, attempted regulation often exceeds the constitutional and statutory limits placed on commissions. This case presents a unique opportunity for the Court to contain the power of public utility commissions when they tamper with protected first amendment rights or encroach into areas that are properly the prerogative of utility management.

This brief *amicus curiae* will demonstrate to the Court some of the many constitutional infirmities created by the CPUC's decision to expropriate the "extra" space in utility billing envelopes for third-parties' ostensible benefit. The Commission's decision not only infringes on the first amendment rights of PG&E, but also on the rights of competing consumer groups desiring to use the "extra" space. The first amendment prohibits government action that enhances the voice of some at the expense of others. This Court is, therefore, compelled to reverse the decision below.

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[5]For a fuller development of the facts, see PG&E's Jurisdictional Statement filed with the Court.

ARGUMENT

I. The CPUC Cannot Allocate "Extra" Envelope Space Without Infringing On Competing Consumer Groups' First Amendment Rights.

The CPUC has conceded that the billing envelope itself is PG&E's property; it is only the "extra" space in the envelope that allegedly belongs to ratepayers. CPUC Decision No. 83-12-047 at A-2 and A-3. MSLF contends that both the billing envelope and the space within are the property of the utility. However, leaving aside the issue of the ownership of the "extra" space, there are still significant infringements of competing consumer groups' first amendment rights when the utility's billing envelope is opened up to them. The CPUC's decision not only fails to address these issues, but the operation of its decision will inevitably interfere with first amendment freedoms.

Commissioner Calvo, in his dissenting opinion to CPUC Decision No. 84-05-039 at A-56, noted:

> As to rights, TURN certainly cannot lay claim to any greater rights than any other ratepayer or consumer group that might request access to the billing envelope. *Thus, I am concerned that this Commission not place itself in a predicament where it will be called upon to resolve disputes as to whom or when or how often a multitude of competing groups or ratepayers should be granted access to the billing envelope.* And, of course, the Supreme Court has implied that some rights are held by the utility should it desire to use the extra space for its purposes. *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980) (emphasis added).

The Commissioner's concerns are well taken. In the proceedings below, the CPUC was not confronted with the task of choosing between competing ratepayer and consumer groups, all vying for the "extra" envelope space, because TURN was the only group that had requested access. However, the CPUC is squarely faced with this problem in proceedings now pending before it regarding Pacific Telephone & Telegraph Company's (Pacific Bell) "extra" envelope space.[6]

The Pacific Bell proceedings bring into sharp focus the problems encountered when a governmental entity becomes the arbiter of who will speak and who will not. Application of the CPUC's ruling to open up the "extra" envelope space mandates that the Commission judge which third-party messages deserve to be published and which do not. Whenever a governmental body, such as the CPUC, dictates which messages are worthy of communicating and which are not, the first amendment is violated.

The Commission itself expressed doubts about the constitutionality of acting:

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[6]There are three different groups clamoring for Pacific Bell's "extra" space. The first group, collectively referred to as TeleCUB, consists of California Public Interest Research Group, Consumers Union, Common Cause of California and Consumer Federation of California. CPUC Case No. 83-08-04. Under TeleCUB's proposal, other ratepayer access would be forbidden. The second group, TURN, has requested access to Pacific Bell's billing envelope in an application similar to the one it filed in the present case. CPUC Case No. 83-12-03. The TeleCUB and TURN proceedings have been consolidated for hearing. The third request for the "extra" space was made by Telephone Users Federation. CPUC Case No. 84-02-01.

> [T]o ban the *Progress* [PG&E's publication] entirely if we simply intend to use that "extra" space for conservation messages, or other speech, composed by the Commission, interested public participants such as TURN or other parties. *This might simply be a substitution of one form of speech for another, a preference for governmentally sponsored or governmentally allowed speech. Such a preference could be more dangerous than the evil which TURN seeks to correct.* We believe it might be invalidated for the reasons the content-based regulation (a ban on pronuclear speech) was invalidated in *Consolidated Edison.*

CPUC Decision No. 93887 at A-69 and A-70 (emphasis added).[7]

Whatever criteria the CPUC adopts, the Commission must necessarily make choices between competing consumer groups, and those choices must focus on the identity of the proposed speakers or the content of their messages. The CPUC has already discriminated in this manner against PG&E by determining that TURN's messages were more meritorious, at least four times during the year, than those of PG&E. Each time the Commission grants access to PG&E's envelope to one or more com-

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[7]The CPUC modified its ruling to avoid the appearance of an outright ban on PG&E's use of the "extra" envelope space during the months that TURN had access. CPUC Decision No. 84-05-039 at A-53(30) (v), *modifying* CPUC Decision No. 83-12-047 at A-32(5) (a). Nevertheless, PG&E will be effectively precluded from using the "extra" space if TURN uses all the space for its own messages.

peting consumer groups, it must again discriminate. These very acts of selection violate the first amendment.

II. The CPUC's Decision Violates The Established Law Of This Court.

CPUC's assumption of the job of allocating the "extra" envelope space ignores the first amendment's prohibitions against governmental discrimination between potential speakers and violates the established law of this Court. Assessing the relative merits of PG&E's and consumer groups' speech is an improper role for the CPUC.

The Supreme Court has recognized that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978). "It is a cardinal principle of the First Amendment that 'government has no power to restrict expression because of its message, its ideas, its subject matter or its content.'" *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 776 (1976) (Stewart, J., concurring). In other words, government has a "paramount obligation of neutrality" toward both the identity of the speakers and the content of their speech. *Young v. American Mini Theaters, Inc.,* 427 U.S. 50, 70 (1976) (Stevens, J., plurality).

In *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976), this Court emphasized that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." Thus, this Court

recognizes that it is antithetical to the first amendment and to government's role in a free society to suppress the speech of one group in favor of another. Indeed, one of the express bases for this Court's ruling in *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 87 (1980), was that there was "no danger of governmental discrimination for or against a particular message."

In this case, however, the CPUC has placed itself in a position where it must discriminate between competing consumer groups in order to carry out its ruling. The first amendment will not tolerate such a result.

III. The CPUC's Justification For Infringing Upon PG&E's First Amendment Rights Fails The Constitutional Test.

For commercial speech to be protected it must "accurately inform the public about lawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557, 563 (1980). Whether PG&E's speech is considered commercial or political, there is no evidence in the record that the utility's publication misinformed or misled the ratepayers. Rather, it was the CPUC's desire "to use the economic value of the extra space more efficiently for the ratepayers' benefit" that led the Commission to regulate the space in PG&E's billing envelope. CPUC Decision No. 83-12-047 at A-21. While the CPUC's decision may arguably result in a more informed ratepaying public, the Commission has effectively banned PG&E from using a critical medium, i.e., its own billing envelope, for speech purposes.

The CPUC's rationale for such a drastic measure pales under first amendment light. When governmental regulation is based on the content of speech, it must be scrutinized more carefully to ensure that a communication is not prohibited "merely because public officials disapprove the speaker's views." *Niemotko v. Maryland,* 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result). The CPUC's decision cannot withstand such exacting scrutiny. The CPUC's ruling can be sustained only upon a showing "that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. of New York v. Public Service Commission,* 447 U.S. 530, 540 (1980). *See also, Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 565-66 (1980) (government regulation of speech must be narrowly tailored).

The CPUC, however, has totally failed to consider the numerous and less restrictive alternatives available to encourage ratepayer participation in commission proceedings or to identify a sufficiently compelling state interest.[8] In addition, the CPUC has failed to grapple with the numerous free speech problems created when a governmental entity takes it upon itself to pick and choose among competing consumer applicants for the "extra" space. Such cavalier treatment by the CPUC of PG&E's protected first amendment freedoms cannot be permitted to continue.

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[8]These various alternatives have been discussed in PG&E's Jurisdictional Statement at 24-25 and will not be reiterated here.

CONCLUSION

The CPUC's ruling that the "extra" space in PG&E's billing envelope be turned over to consumer groups does not withstand first amendment scrutiny. The ruling places the CPUC in the untenable position of choosing which competing consumer groups gain access to the utility's billing envelopes and which are foreclosed, based upon the identity of the group and the content of the speech. In addition, the CPUC has failed to provide adequate justification for the resulting ban on PG&E's speech.

For these reasons, the CPUC's ruling must be invalidated as violative of the first amendment.

Dated this 29th day of May, 1985.

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INTEREST OF THE *AMICI CURIAE*, NATIONAL FUEL, *ET AL.*

National Fuel Gas Distribution Corporation, The Brooklyn Union Gas Company, Central Hudson Gas & Electric Corporation, and Rochester Gas and Electric Corporation are privately-owned public utility companies which provide service to a total of nearly two million gas customers and more than one-half million electric customers in the State of New York. All four companies are subject to the jurisdiction of the New York State Public Service Commission ("PSC").

A PSC-mandated billing envelope access scheme substantially similar to that imposed by the appellee, California Public Utilities Commission ("PUC" or "Commission"), on the appellant, Pacific Gas and Electric Company ("PGandE" or "Company"), in the instant case was struck down by the New York Supreme Court.

On May 14, 1984, the PSC issued its *Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes* (Case 28655 - "Proceeding on Motion of the Commission to Examine Ratepayer Access to Utility Billing Envelopes and the Concept of a Citizens' Utility Board")[1] in which it required New York's major privately-owned gas, electric and telephone utilities to provide access to their billing envelopes to consumer organizations. National Fuel, *et al.*, subsequently applied for rehearing on the PSC's *Statement of Policy,* and that application was denied on November 14, 1984. On December 13, 1984, National Fuel, *et al.*, commenced an action in Supreme Court, Albany County, New York, for a declaration that, *inter alia,* the *Statement of Policy* violated their

[1] The PSC's *Statement of Policy* is reproduced in the Appendix to PGandE's Jurisdictional Statement as Appendix I, at pages 111a-41a.

rights to free speech and association protected by the First and Fourteenth Amendments to the United States Constitution and deprived them of their property (*i.e.*, the billing envelope) without due process of law or just compensation, in contravention of the Fifth and Fourteenth Amendments. The case was argued together with a similar action[2] before the New York Supreme Court, Special Term, on January 4, 1985. On April 10, 1985, the court issued a decision[3] concluding that the *Statement of Policy* violated the utilities' rights under the First and Fourteenth Amendments. *Consolidated Edison Co. v. Public Service Comm'n,* ____ Misc. 2d ____ (Sup. Ct. Albany Co. April 10, 1985, Index No. 10762-84). Specifically, the New York Supreme Court determined that the PSC violated the utilities' right to refrain from speaking and that it impermissibly engaged in the regulation of speech, not only by determining what group or groups would have access to billing envelopes, but also by deciding whether the content of such enclosures is objectionable. The PSC and the intervenors-respondents have appealed to the Appellate Division of the New York Supreme Court. At this time, the appeal has not been briefed or argued.[4]

Although there are some differences between the New York and California billing envelope access schemes, it is clear that a decision by this Court as to the First Amendment issues in the

[2] Brought by three other privately-owned New York utilities, Consolidated Edison Company of New York, Inc., Continental Telephone Company of New York, Inc., and New York State Electric & Gas Corporation.

[3] The April 10, 1985 decision amended the court's initial decision issued March 19, 1985.

[4] A stay of the New York Supreme Court's Judgment and Order nullifying the forced access requirement of the *Statement of Policy* was automatically imposed by statute when the PSC appealed. To preserve the status quo pending the appeal, the utilities moved to vacate the stay. When this brief was printed the Appellate Division, Third Department, had not yet rendered a decision on the motion.

instant case will have an important impact on the litigation currently pending in New York. Accordingly, National Fuel, *et al.*, have an important stake in the outcome of this case.

Our purpose in this brief is not to repeat the arguments of PGandE, but rather to focus upon a limited number of points which we believe warrant particular attention.

We have obtained the written consent of each party to file this brief and have filed such consents with the Clerk of the Court.

SUMMARY OF ARGUMENT

Despite the fact that it is a regulated utility corporation, PGandE is entitled to the protections afforded by the First Amendment for its freedom of expression. The envelopes in which PGandE sends its bills for service and other communications to customers are the property of PGandE, not the Company's ratepayers, not Toward Utility Rate Normalization ("TURN"), and not the State of California. By ordering PGandE to include in its envelopes the messages of TURN, an organization hostile to the interests of PGandE, the PUC unconstitutionally restricts PGandE's right to use its property to communicate with customers and compels PGandE to support the communication of, and become associated with, messages to which it is opposed. The PUC has not met — nor could it meet — its burden of demonstrating that the foregoing infringement of PGandE's First Amendment rights is justified by a compelling state interest. Even assuming, *arguendo,* that such an interest had been, or could be, shown, the PUC has not demonstrated that the infringement of PGandE's rights is narrowly tailored to serve that interest and that the Commission's promotion of such interest is ideologically neutral.

In short, as will be demonstrated in more detail in this brief, the PUC's forced-access requirement restricts PGandE's First Amendment rights and fails to meet the applicable test for a valid governmental limitation on such rights.

ARGUMENT

POINT I

PUBLIC UTILITY CORPORATIONS ARE ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT.

Although PGandE is a public utility whose business of providing gas and electric service to customers is subject to extensive regulation by the PUC, the Company is entitled to the freedom of expression guaranteed by the First Amendment. *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530 (1980); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, *reh'g denied,* 438 U.S. 907 (1978). This Court's decisions in *Consolidated Edison* and *First National Bank* also make clear that the protection afforded a privately-owned public utility corporation is no less comprehensive than that afforded other individuals and organizations. *Consolidated Edison, supra,* at 533; *First National Bank, supra,* at 777.

POINT II

THE BILLING ENVELOPE AND THE SPACE INSIDE IT ARE PGandE'S PROPERTY.

The PUC's assertion, that it may, consistent with the First Amendment, compel the inclusion of TURN's messages in PGandE's billing envelopes, is founded primarily upon the notion that such a requirement does not interfere with the use of any utility-owned property for communications purposes. Instead, according to the Commission, this requirement merely affords

ratepayers an opportunity to benefit from the utilization of property (the "extra space" in the billing envelope) which they purportedly purchased as a consequence of their payment for gas and electric service. Dec. No. 83-12-047, App. to Juris. Statement 2a-3a. This foundation to the Commission's argument is as infirm as it is novel.

Although PGandE's property is used in the rendition of service to the public, and, in most cases, the cost of that property ultimately is borne by customers through payments for service, those customers do not thereby acquire an interest in any of PGandE's property. In *Board of Public Utility Comm'rs v. New York Telephone Co.*, 271 U.S. 23, 32 (1926), the Court stated this fundamental principle succinctly:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock.

The State of California, while permitted to regulate PGandE's rendition of public service "with a view to enforcing reasonable rates and charges, . . . is not the owner of the property of public utility companies, and is not clothed with general power of management incident to ownership." *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n,* 262 U.S. 276, 289 (1923). In *Consolidated Edison Co. v. Public Service Comm'n, supra,* the Court specifically acknowledged the utility's ownership of billing envelopes, referring to Consolidated Edison's efforts "to utilize *its own billing envelopes"* to communicate with its customers.[5] 447 U.S. at 540 (emphasis added).

The PUC's effort to separate "extra space" from PGandE's privately-owned billing envelope[6] and to redefine that space as "ratepayer property" (Dec. No. 83-12-047, App. to Juris. Statement 3a) is an obvious attempt to circumvent this Court's decision in *Consolidated Edison, supra.* According to the Commission, by so defining the ownership of the "extra space," it was "not so much describing a traditional property right as an equity right." Dec. No. 83-12-047, App. to Juris. Statement 4a. The rationale giving rise to this "equity right" is that, by virtue of current postal regulations which require the sender of an envelope to pay for a full ounce of postage even if the envelope and contents weigh considerably less, ratepayers have effectively paid for some empty space in the envelope and are entitled to benefit from use of that space. *Ibid.*

In addition to conflicting directly with this Court's precedents on the subject of ownership and management of utility property (*see, e.g., Board of Public Utility Comm'rs, supra,* 271 U.S. at 32), the PUC's proposed bifurcation of ownership, separating ti-

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[5] In so stating, the Court clearly rejected the dissent's suggestion that the billing envelope somehow stood on a different footing because it had been purchased by the utility with funds supplied by customers' payments for service. *Consolidated Edison, supra,* at 555 (Blackmun, J., dissenting).

[6] The PUC, by its own acknowledgement, "did not adopt the idea that the envelope itself is ratepayer property, as TURN suggested." Dec. No. 83-12-047, App. to Juris. Statement 2a-3a.

tle to the envelope — and, apparently, some of the space inside[7] — from title to the empty or "extra space" therein, is absurd on its face.[8]

To view an envelope as being somehow separate from the space inside is contrary to common sense. An envelope exists for the purpose of mailing written or printed matter. Use of the space within the envelope is use of the envelope. The two are inseparable. To suggest that an insert placed in an envelope does not "use" the envelope is the equivalent of asserting that one who walks into a room or stores material therein does not "use" the room.

Similarly, employing the same logic that the PUC has applied to billing envelopes, one would conclude that ratepayers are entitled to use the utility's office space, vehicles and computers whenever the utility is not doing so. Indeed, because the utility's First Amendment rights might not be implicated as a result of compelled third-party use of such equipment and facilities, the basis for such compulsion, if valid at all, would appear to be much stronger than in the instant case where the use of billing envelopes so clearly implicates freedom of expression. The result is contrary to common sense; but it is exactly where the PUC's reasoning leads.

Even the PUC and TURN might be troubled by the proposition that persons who purchase goods and services from a private, non-utility corporation are thereby entitled to enclose their

[7] *I.e.*, the portion which is currently physically occupied by PGandE's enclosures, including the bill, but excluding *Progress*.

[8] The PUC's fall-back position, that its conclusions regarding ownership of the space within PGandE's billing envelopes are not properly subject to review in this appeal (PUC Mot. to Dismiss 8-9; *cf.* Dec. No. 83-12-047, App. to Juris. Statement 6a), was adequately addressed by PGandE in its Brief in Opposition to Motions to Dismiss (at 1, n.1) and we need not elaborate here.

messages in the corporation's billing envelopes.[9] But the Commission's rationale for finding an "equity right" in the "extra space" (Dec. No. 83-12-047, App. to Juris. Statement 4a) applies with equal force to non-utility enterprises. If customers of a utility somehow acquire an "equity right" in envelope space by virtue of their payment for utility service, then there is absolutely no reason why customers of a non-utility business do not acquire an identical "equity right" to the space in billing envelopes used by the latter firms. This result, too, is absurd; but, once again, it is where the PUC's approach inexorably leads.

The Commission's attempt to "redefine" PGandE's property interest in its billing envelopes in such a way as to preclude the Company from arguing that it is being unconstitutionally restricted in the use of its property for the exercise of its freedom of expression represents a cynical, result-oriented abuse of regulatory authority. If the Commission were to succeed in so blithely redefining property interests to suit the political climate of the moment, no property belonging to any commercial enterprise — from the smallest sole proprietorship to the largest Fortune 500 company — would be safe from such abuse.

[9] *Cf. Consolidated Edison, supra,* 447 U.S. at 552-53 (Blackmun, J., dissenting):

> [A] state law requiring a person to permit the utility to include its insert in the envelope with that person's private letters clearly would infringe upon the letterwriter's First and Fourteenth Amendment rights.

POINT III

FORCED ACCESS BY TURN TO PGandE's BILLING ENVELOPES INFRINGES PGandE'S FREEDOM OF EXPRESSION IN AT LEAST TWO SUBSTANTIAL WAYS.

The Commission's decisions deprive PGandE of its right to express itself, first, by limiting the Company's ability to use the envelope space occupied by TURN for the communication of PGandE's own messages, and second, by forcing the Company to carry messages with which it disagrees. Neither form of infringement has been, or can be, justified.

A. The PUC Precludes PGandE From Including Communications Of Its Choosing In The Billing Envelope.

During four months of every year — to be selected by TURN — TURN is not only afforded access to PGandE's billing envelopes, but is endowed with unfettered discretion to entirely displace the Company's communications.[10] *See* Dec. No. 84-05-039, App. to Juris. Statement 51a. The PUC thus places PGandE's ability to communicate effectively with its customers at the mercy — and caprice — of TURN for at least one-third of the year. As Commissioner Bagley stated succinctly in his dissent from Decision No. 84-05-039,

> . . . TURN can determine, solely by its choice of paper weight, whether or not and if so how much material may be inserted in the envelope by [PGandE's] management on behalf of the shareholder. . . . Under this order we have the unseemly situation where government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other. That, compared to government proscription, is deprivation squared.

App. to Juris. Statement 59a-60a (citation omitted).

[10] In addition to displacement by "using up" the first ounce of postage, the physical capacity of the envelope itself may be reached.

As will be made clear in Point IV, *infra,* the PUC has failed to make the constitutionally required showing to justify the foregoing restriction on PGandE's freedom to communicate.

B. The PUC Compels PGandE To Speak And To Support, And Become Associated With, The Speech Of TURN.

In addition to the direct preclusive impact on PGandE's ability to include its communications in the billing envelope, as described above, the PUC's decisions violate PGandE's constitutionally protected right to refrain from speaking and providing compelled support for the speech of TURN. The right to speak and the equally protected right to refrain from speaking "are complementary components of the broader concept of 'individual freedom of mind.' " *Wooley v. Maynard,* 430 U.S. 705, 714 (1977) (*quoting West Virginia Board of Education v. Barnette,* 319 U.S. 624, 637 (1943)). Together, these rights protect a person's interest in presenting or withholding his views whenever, wherever and however he desires.[11] The PUC's decisions violate this freedom by placing the messages of TURN — a non-democratically constituted organization with a history of opposition to PGandE's interests and views (Dec. No. 83-12-047, App. to Juris. Statement 14a-15a) — in billing envelopes identified as being those of PGandE and, to the extent there is any space left in those envelopes, in the very same envelopes with PGandE's own

[11] With obvious and narrow exceptions designed to serve overriding governmental interests. *Miller v. California,* 413 U.S. 15, *reh'g denied,* 414 U.S. 818 (1973) (obscene speech not protected by First Amendment); *Brandenburg v. Ohio,* 395 U.S. 444 (1969) (state may proscribe advocacy directed to inciting imminent lawless action and likely to produce such action); *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942) (punishment of utterance of "fighting words" not prohibited by Constitution).

messages. It is not mere speculation to suggest that a communications medium, which has been identified for more than 60 years as an exclusive vehicle for expressing PGandE's views on important matters,[12] will lose that characteristic and hence its effectiveness. TURN inserts will undoubtedly attack PGandE's positions stated in *Progress* and elsewhere, and force PGandE either to respond to some or all of TURN's statements or to run the risk that silence will be regarded by recipients as acquiescence.[13] The consequence of the PUC's decisions is to compel speech and association against PGandE's wishes, and thereby to abrogate the Company's First Amendment rights.

This Court has long held that the State cannot compel a person to convey a message with which he disagrees. ***West Virginia Board of Education v. Barnette, supra*** (compulsory recitation of pledge of allegiance). This right to remain silent extends to situations in which a person is neither directly prohibited from expressing his own views in the first instance nor precluded from

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[12] The fact that the PUC has required PGandE to convey certain information which, by the Commission's own description (PUC Mot. to Dismiss 11), is service-related has no bearing on the issues in this appeal. In the first place, what is at issue is not the PUC's authority to require PGandE to convey (or even physically enclose) the Commission's messages in billing envelopes, but rather whether the PUC can constitutionally order PGandE to carry the messages of a non-governmental entity (TURN). In the second place, regardless of the source or nature of the messages PGandE may have carried in the past, such action cannot be construed as a waiver of First Amendment protections. Acquiescence in past violations of a First Amendment right does not operate to waive that freedom. "Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, [the Court is] unwilling to find waiver in circumstances which fall short of being clear and compelling." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 145, *reh'g denied,* 389 U.S. 889 (1967).

[13] As discussed at note 22, *infra,* the Court has recognized the particular difficulties that arise where one's property is used as a forum to attack that owner.

responding to the message he is forced to carry. ***Miami Herald Publishing Co. v. Tornillo,*** 418 U.S. 241, 256 (1974) (requirement that newspaper print candidate's reply to editorial endorsement). Likewise, as the *Miami Herald* case makes clear, the right to remain silent is violated even if the specific message to be carried is not dictated by the government.

The framework for evaluating the constitutionality of a State compulsion to carry a message was enunciated by the Court in ***Wooley v. Maynard, supra.*** The principles stated therein are equally applicable to the facts of this case.

In *Wooley,* the appellees argued that New Hampshire's requirement that their vehicle bear license plates with the State motto "Live Free or Die" was repugnant to their moral, religious and political beliefs and thus they could not, consistent with the First Amendment, be forced to display the motto. This Court formulated the question before it as

> whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by ***displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.***

430 U.S. at 713 (emphasis added). In holding the statute unconstitutional, the Court stated that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all" (*id.* at 714), and that "[t]he First Amendment protects the rights of individuals . . . to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* at 715. The Court found no countervailing interest on the part of the State sufficient to justify the infringement of the appellees' First Amendment rights. *Id.* at 716-17.

The *Wooley* case is closely analogous to the instant situation in which PGandE is being compelled by the PUC to carry TURN's

messages in its privately-owned billing envelopes for the purpose of having them distributed to and read by the public. Indeed, the nature of the State compulsion is even more egregious in this case than it was in *Wooley*. TURN's messages are to be placed right in PGandE's billing envelope, distracting from, if not displacing altogether, PGandE's messages. Unlike the brief motto on New Hampshire license plates, TURN's messages will, in addition to affirmatively espousing that entity's views,[14] attack, either explicitly or by implication, PGandE's views. There is, of course, an even greater danger that the recipient of a TURN message included in a PGandE billing envelope will assume that the message is either endorsed by PGandE or at least acquiesced in by the Company. Common sense tells us that such a likelihood far exceeds the likelihood that the act of affixing a license plate to a vehicle will be misconstrued by the public as agreement with the motto appearing on the plate. Thus, there can be no real doubt that PGandE's right of expression is infringed by the PUC's envelope access scheme.

POINT IV

THE PUC'S INFRINGEMENT OF PGandE'S FREEDOM OF EXPRESSION FAILS TO PASS CONSTITUTIONAL MUSTER.

As articulated in *Wooley*, in order to justify its requirement that PGandE carry TURN's messages, the Commission must demonstrate that *each* of the following criteria is satisfied: (1) the State's interest is sufficiently compelling to warrant the action; (2) the State's objective cannot be achieved by narrower means; and (3) the purpose of the restriction is ideologically neutral.

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[14] As the Court's decision in *Miami Herald Publishing Co. v. Tornillo, supra,* suggests, the fact that TURN will espouse its own views and not a specific message prescribed by the State of California does not diminish the infringement of PGandE's constitutional rights. *See* pp. 20-21, *infra.*

Wooley, supra, at 716-17. As in all cases involving limitations on First Amendment rights, the burden of proof as to each element of the test is on the State. *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 786; *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 560 (1975); *Freedman v. Maryland,* 380 U.S. 51, 58 (1965); *Speiser v. Randall,* 357 U.S. 513, 528-29, *reh'g denied,* 358 U.S. 860 (1958). The PUC has not met its burden — nor could it — on any of the foregoing criteria.

A. The PUC Has Not Demonstrated A Compelling Interest In Mandating Access By TURN To PGandE's Billing Envelopes.

This Court has made clear that encroachment upon First Amendment freedoms "cannot be justified upon a mere showing of a legitimate state interest." *Kusper v. Pontikes,* 414 U.S. 51, 58 (1973). Such justification requires a demonstration of a paramount state interest. *Elrod v. Burns,* 427 U.S. 347, 362 (1976). The PUC has not made — nor can it make — such a showing.

The PUC has described, in various ways, the interests intended to be served by TURN's access to PGandE's billing envelopes. The eight nominally distinct interests listed at pages 17-18 of the Commission's Motion to Dismiss boil down to two basic categories: (a) promoting consumer representation and the expression of additional views in PUC proceedings, and (b) preventing PGandE's "misappropriation" of ratepayer property. The Commission, however, has not demonstrated that these interests are sufficiently compelling to require that PGandE's freedom of expression be subordinated thereto.

The Commission's suggestion that, unless it obtains access to PGandE's billing envelopes, TURN "cannot participate in all the regulatory proceedings of PG&E it might otherwise participate in without significant financial hardship" (Dec. No. 83-12-047, App. to Juris. Statement 16a), overlooks the established princi-

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No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE GAS DISTRIBUTORS INFORMATION SERVICE

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MISCELLANEOUS:

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Best, W.M., *A Treatise on Presumptions of Law and Fact*, (1845) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

BRIEF OF AMICUS CURIAE GAS DISTRIBUTORS INFORMATION SERVICE

Gas Distributors Information Service, having obtained and filed written consent of all parties to the case as required by paragraph 2 of Rule 36, submits this brief in support of the position of appellant Pacific Gas and Electric Company (PG&E).

INTEREST OF AMICUS CURIAE

Gas Distributors Information Service (GDIS) is a voluntary, unincorporated association of nineteen investor-owned companies and one municipal company engaged in distribution of natural gas throughout the central and eastern United States and the upper plains states. Member company distribution operations are regulated at the state or local

level. Based initially on a common interest in federal regulation of interstate natural gas transmission companies which serve as primary suppliers to members, GDIS provides information to members on federal regulation of the natural gas industry.

GDIS member companies are regulated utilities which distribute natural gas directly to residential, commercial and industrial users in their respective service areas, supplying a source of energy used for heating, cooling, hot water, cooking and clothes drying needs of consumers. As such, natural gas distribution companies are part of an energy industry which includes other fuel marketers competitively seeking to satisfy these same consumer needs and actively engaged in attempting to influence the consumer's decision as to choice of fuel. GDIS members, therefore, are regulated utilities which do business in a competitive environment. While they do not compete in their service areas with other gas utilities, GDIS members face formidable competition from other energy companies, both regulated and unregulated.

This very point was recognized by the Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980). The Court rejected the suggestion of the New York Court of Appeals that, because Central Hudson holds a monopoly over the sale of electricity in its service area, the Commission order restricting advertising did not restrict commercial speech of any worth. 447 U.S. at 566. Rejecting this suggestion as a basis for finding that Central Hudson's advertising was not protected commercial speech, the Court observed:

> Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. . . . Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.

447 U.S. at 567.

The decision of the California Public Utilities Commission (CPUC) in the instant case ordering that a private consumer group be given compulsory access for its messages to PG&E's monthly billing envelopes is based on a finding by CPUC that the ratepayer has a legal or equitable right to the extra space in PG&E's billing envelope.[1] CPUC observed that it would be beneficial for ratepayers that a private group approved by CPUC use the space to disseminate messages different from those of PG&E. Appendix, at A-17.

Neither legal precedent nor historical support exists for characterizing PG&E's billing envelope or extra space within it as anything other than the property of PG&E. Notwithstanding the long established principle of law that utility customers pay for service, not for the property used to render it, *Board of Public Utility Comm.* v. *New York Tel. Co.*, 271 U.S. 23 (1926); *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Comm'n*, 262 U.S. 276 (1923); *Smyth* v. *Ames*, 169 U.S. 466 (1898), the CPUC finds that

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[1]CPUC defined "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." Appendix to Appellant's Jurisdictional Statement, at A-3 [hereinafter cited as "Appendix"].

ratepayers possess rights to the extra space and, on the strength thereof, private consumer organizations found to represent ratepayers may utilize the extra space to disseminate their views to ratepayers without the consent of PG&E.

The ramifications of this ruling for GDIS members are sobering as are the implications of CPUC's alternate holding that, regardless of whether ratepayers have any property interest therein, access to a utility's billing envelope for the messages of private consumer organizations may be compelled on the ground that messages from a non-utility source are "beneficial to the ratepayers." Appendix, at A-48. If protected First Amendment rights of a regulated company may be extinguished by the simple device of characterizing utility property as property of the ratepayer, then it is certainly not difficult to imagine other, less exalted rights succumbing to other, equally gossamer characterizations.

Privately owned utilities enjoy the full panoply of First Amendment protections for their comments on public issues, *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530 (1980), and any significant imposition by the State on such protected speech, be it direct or indirect, intentional or incidental, is considered an abridgement of free speech. *Speiser* v. *Randall*, 357 U.S. 513 (1958). The commercial speech of a utility is entitled to constitutional protection as well. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, *supra*. If the utility's communication is neither misleading nor related to unlawful activity, the State cannot regulate commercial speech unless a substantial interest of the State is directly advanced and the narrowest types of restriction on expression are employed. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. at 564-565.

If the compulsory access ruling in the instant case can withstand First Amendment scrutiny applicable both to protected commercial and non-commercial speech of a utility, thereby providing a sanction for the requisitioning of space in a utility's billing envelope to carry the message of private consumer groups, the field is open to the discovery of other novel incidents of ownership which may also be disconnected from the underlying property and employed by regulatory bodies for like purposes. And if, as here, legal fictions need not be grounded in necessity and equity,[2] then the imagination is free to roam the entire business of the utility in search of items of property which may be subjected to comparable disconnection.

If unused space in a billing envelope may be taken over and allotted to the use of a private consumer organization, no significant extension of the doctrine is necessary to permit a finding of ratepayer property interest in unused space on utility trucks or truck bumpers for the placement of anti-utility messages. Salaries of meter readers and appliance service personnel are paid from funds generated by ratepayers and, because such individuals must regularly visit ratepayer residences in any event, it is only a small

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[2]As stated by Blackstone in the Commentaries, "Fictions of law, although they may startle at first, will be found, on consideration, to be highly beneficial and useful." Quoted in W. M. Best, A Treatise on Presumptions of Law and Fact, 24-25 (1845). According to Best, it is a well known maxim of the common law that "in fictione juris, semper subsistit aequitas." Id., at 25. In consequence of this maxim, the author notes, two rules have been laid down. "First, fictions are only to be made for necessity, and to avoid michief [sic], and, consequently, must never be allowed to work prejudice or injury to an innocent party." Id., at 25. The second rule is "that the matter assumed as true must be something physically possible." Id., at 25-26. The fiction that ratepayers own the extra space in PG&E's billing envelopes fails both rules and the maxim as well.

extension of the CPUC doctrine to require such personnel to drop off fund solicitations and other messages of consumer groups. No extension whatever is needed to cover space in window displays in a utility's downtown office or in appliance showrooms. All of these interface areas wherein a utility operation comes into contact with the ratepayer are potential means of conveying fund solicitation and other consumer messages.

It is a premise of the CPUC ruling that the extra space has value. Appendix, at A-3. If that assessment is correct, it may well occur that other consumer organizations will claim to represent ratepayers and that access to billing envelopes or to other "artifacts generated with ratepayer funds," Appendix at A-3, by multiple consumer groups will ensue. If multiple access were permitted either serially or simultaneously, it would be natural to expect, absent regulation of content by CPUC as is its style in this matter, that each representative would strive to be regarded as the most effective advocate of the ratepayer interest in connection with the issue of the day. While a multiplicity of opinions is unremarkable in an open society, it would indeed be remarkable doctrine if a utility company which competes for customers with other fuel sources and which, in consequence, attempts to disseminate information on the peculiar advantages of its service may be compelled to convey to customers the messages of one or more private groups which may well emphasize alleged inadequacies and high cost of such service.

SUMMARY OF ARGUMENT

Like other commercial enterprises, utility companies have traditionally used inserts in their monthly billing envelopes to communicate with their customers on commercial matters as well as on public issues of the day. In respect

of such speech, privately owned utility companies enjoy the full panoply of First Amendment protection, *Consolidated Edison Co.* v. *Public Service Comm'n*, supra; *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, supra, and a utility is protected in its desire to "use its own billing envelopes to promulgate its views on controversial issues of public policy." 447 U.S. at 540. The dedication of such assets to a regulated activity does not, under precedents established in this Court, result in a loss or diminution by the utility of its property therein. *Board of Public Utility Comm.* v. *New York Telephone Co.*, 271 U.S. 23 (1926).

By declaring that property in the extra space of PG&E's billing envelope resides in the ratepayer and that private consumer representatives selected by CPUC are entitled to access to the envelope, PG&E's right to promulgate its views is made to hinge on a matter of property rather than of First Amendment right. Where fundamental rights of speech depend for their exercise on property in a particular means of communication, the allocation by the State of property therein to another by means of a fiction such as here constitutes an abridgment of protected speech.

When a utility uses its billing envelope to promulgate its views to customers it is exercising protected First Amendment rights and does not thereby dedicate the envelope as a medium for public debate. Because the right to speak and the right to remain silent are equal components of free speech, *Wooley* v. *Maynard*, 430 U.S. 705 (1977), whether PG&E is denied access to the extra space or compelled to publish the views of private groups an abridgment of First Amendment rights occurs.

Before the State may regulate protected speech it must demonstrate that regulation serves a compelling state interest and that its regulation is narrowly drawn. *Consolidated*

Edison Co. v. *Public Service Comm'n*, supra. Neither of the interests identified here, that appellant is a monopoly utility and that ratepayers should be informed of a broad range of views, is in itself adequate to support regulation of protected speech. *Consolidated Edison Co.* v. *Public Service Comm'n*, supra; *Miami Herald Publ. Co.* v. *Tornillo*, 418 U.S. 241 (1974). Other less intrusive methods are available to promote increased ratepayer participation and awareness such as awarding of fees to intervenors in CPUC proceedings.

ARGUMENT

PG&E's Rights Are Abridged In Violation of the First Amendment By the CPUC Order Assigning to a Private Party Access to the Company's Billing Envelopes For the Purpose of Soliciting Funds From Ratepayers and Communicating Views to Them

It has long been settled by decisions of this Court that the dedication of assets to a regulated activity does not result in a loss or diminution by the utility of its property in such assets. *Board of Public Utility Comm.* v. *New York Telephone Co.*, 271 U.S. 23 (1926); *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Comm'n*, 262 U.S. 276 (1923); *Smyth* v. *Ames*, 169 U.S. 466 (1898). As stated in *Southwestern Bell:* "It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership." 262 U.S. at 289. The state is not the owner of the property of a utility company and neither is the ratepayer. Customers pay for service, not for the property used to render it. "By paying bills for service [customers] do not acquire any interest, legal or equitable, in the property used for their con-

venience or in the funds of the company." *Board of Public Utility Comm.* v. *New York Telephone Co.*, 271 U.S. at 32.

In light of the foregoing, there is no legal support for characterizing either PG&E's billing envelope or extra space within it as being other than the property of PG&E. It is apparent, however, that CPUC was at considerable pains to divest PG&E of property in the extra space so as to establish a legal basis for requiring the message of consumer representatives. While not adopting the notion that the envelope itself is ratepayer property, CPUC found that the extra space in the billing envelope has value and, as an "artifact generated with ratepayer funds," it would unjustly enrich PG&E if the excess space were not considered ratepayer property. Appendix, at A-2, A-3.

CPUC's analysis of the ratepayer's interest in the extra space was subsequently refined as follows:

> We have stated that the extra space belongs to the ratepayers. In so doing, we are not so much describing a traditional property right as an equity right . . . . [W]e are saying that the *reason* the ratepayers pay for the billing envelopes and postage is that those costs are an expense necessary to the operation of the utility. So what the ratepayers are legitimately paying for is the conveyance of their bills and occasionally legally mandated notices. Since these documents together do not generally add up to one ounce . . . the ratepayer has paid for some empty space . . . . "

Appendix, at A-4. Thus, while decisions of this Court have made clear that by paying for service customers secure no interest, legal or equitable, in the utility property used for their convenience, *Board of Public Utility Comm'n* v. *New York Telephone Co.*, 271 U.S. at 32, CPUC finds that the

extra space belongs to the ratepayer either as a legal right or as an equity right.

In recognition perhaps that its legal analysis stood in need of shoring up, CPUC supplemented its ruling following PG&E's application for rehearing to point out that its jurisdiction over the extra space did not depend "solely or entirely" on a determination of the ownership of the extra space or the exact nature of a property right in such space:

> The extra space in the billing envelope is a byproduct of an activity essential to the operation of the regulated utility - billing. Since billing is an essential and proper function of a regulated utility this Commission has allowed the utility to recover its reasonable expenses - postage, materials, labor, overhead - from ratepayers. The existence of the extra space is a direct consequence of the act of billing for utility services and the way in which postal costs are assessed.

Appendix, at A-46. In further support of its finding of jurisdiction over "billing space," CPUC observed:

> Use of the billing space to accomplish various informative functions for the ratepayers now occurs so frequently that it had [sic] become a routine matter. Notices of applications for rate increases and notices of public hearings are regularly inserted without objection in billing envelopes. . . . We have also required utilities to include notices of the availability of various energy conservation programs (D. 92653) and conservation information (D. 89316). We have required our utilities to include an insert informing ratepayers of the effects of a complicated federal tax law (D. 93887). . . . All of these are examples of the proper use of a valuable means of communication that the extra space provides.

Appendix, at A-47. Having cited the foregoing examples of use of billing space for the benefit of ratepayers, CPUC noted that the proposal of the private consumer group TURN (Toward Utility Rate Normalization) for access to the extra space would also be beneficial to ratepayers on the assumption that "ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." Appendix, at A-17. In consequence, CPUC granted TURN access four times a year for a two-year period with no control imposed by CPUC on the content of the TURN material. Appendix, at A-17.

The legal basis, therefore, for CPUC's order mandating that a private organization be given access to extra space in the billing envelope of PG&E for the purpose of using that vehicle to disseminate its views is that ratepayers possess a legal or equitable right to such space and, in any event, access to such space would be beneficial to the ratepayer. There are a number of reasons why the CPUC order does not withstand First Amendment scrutiny.

(1) The CPUC Order Implicates Protected Rights of Speech And Thus First Amendment Scrutiny May Not Be Circumvented By the Expedient of Declaring Extra Space to Be the Property of Ratepayers.

If a utility company such as PG&E did not possess rights protected by the Constitution, there might be no objection to establishing the concept that ratepayers possess a property interest in the extra space of a billing envelope. Indeed, CPUC conceives of the issues in the instant case essentially as property issues rather than issues of constitutional right. To each of PG&E's objections founded in the Constitution, CPUC answers that PG&E does not possess property in the extra space.

Thus, CPUC meets the Fifth Amendment "taking" contention by stating that the company ignores the "central

point" that the extra space is not property held by PG&E. Appendix, at A-26. In like manner, property is set up in answer to each of the First Amendment objections. To the extent PG&E's message is forbidden in favor of TURN's, this result occurs, says CPUC, "on the ground that the space belongs to the ratepayers, not on the basis of the content." Appendix, at A-21. To the extent PG&E is being required to publish messages it does not wish to publish, that too is readily answered by CPUC: "[W]e are simply ordering PG&E which has physical control over the extra space belonging to the ratepayers to make it available." Appendix, at A-23. As to the issue of narrowly tailored means to serve a compelling State interest, that question, according to CPUC, does not even arise: "As we have reiterated many times now, since that space is not the property of PG&E in the first place, it has no right to use the space for First Amendment purposes." Appendix, at A-22.

CPUC's property approach is an impermissible abridgment of speech precisely because PG&E possesses First Amendment rights to communicate to its customers through its billing envelopes and, if it chooses, to refrain from so communicating. At least since this Court's decision in *Consolidated Edison Co.* v. *Public Service Comm'n*, *supra*, the First Amendment protection recognized as surrounding a utility company's use of its billing envelope as a means of communication, even though the envelope may also be a necessary adjunct to the utility's operations, has demanded far greater sensitivity to the fundamental rights involved than the short shrift manifested in the CPUC decision. Where fundamental rights of speech depend for their exercise on property in a particular means of communication, the compulsory allocation of access thereto by the State plainly implicates the First Amendment.

By declaring the extra space in the envelope to be ratepayer property, CPUC forecloses analysis of the abridgment by setting up the abridgment itself as its own justification. As such, the CPUC analysis is defective. The constitutional issue that must be addressed is whether a finding of ratepayer property in the extra space, property which had heretofore been generally agreed to be in PG&E, so restricts a utility's fundamental right of communication to its customers that it is impermissible unless a compelling State interest is thereby promoted and narrower alternative means are unavailable to the State. Certainly a private owner has the right to preserve the property under its control for the use to which it is lawfully dedicated. *Cf. U.S. Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 (1981). If such property is a vehicle of First Amendment rights, as here, CPUC may not summarily extinguish such property without rigorously observing the constitutional forms.

(2) PG&E's Use of Its Billing Envelope For Communication With Customers Is A Traditional Use And Does Not Constitute a Dedication of the Envelope as a Vehicle For Public Debate.

It is well established that one essential aspect in the bundle of rights that constitute property is the right to exclude others. *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 82 (1980). In the area of speech, a private property owner possesses a First Amendment right not to be forced by the State to use his property as a forum for the speech of others. *Wooley* v. *Maynard*, 430 U.S. 705 (1977). Nevertheless, at an owner's behest private property may be so used by the public as to constitute a dedication to public use, *Pruneyard Shopping Center* v. *Robins*, 447 U.S. at 87, and in such situations the owner may be required to permit dissemination on his property of ideological messages.

Unlike shopping centers which deliberately choose to open private property to a broad range of expression, the

billing envelopes of PG&E have not been opened to the public for discussion of views. Aside from monthly bills and legally mandated notices, the only material included in the envelopes is PG&E's own in-house publication, *Progress*. Appendix, at A-2. Utility companies have traditionally used their billing envelopes to communicate with customers and this practice, engaged in by many commercial enterprises, cannot reasonably be deemed to dedicate the billing envelope as a medium of public debate. Indeed, this very distinction was drawn in *Consolidated Edison* where the Court contrasted Con Ed's desire "merely to use its own billing envelopes to promulgate its views on controversial issues of public policy," 447 U.S. at 540, with factual settings in *Greer* v. *Spock*, 424 U.S. 828 (1976), and *Lehman* v. *Shaker Heights*, 418 U.S. 298 (1974), where private parties asserted a right of access to public facilities.

(3) Compulsory Access By a Private Party to PG&E's Billing Envelope Denies PG&E the Right to Remain Silent and Is a Regulation of the Content of Its Speech

The right to speak and the right to remain silent are equal components of the right of free speech guaranteed by the First Amendment, and a person may not be compelled to publish a message or advocate a proposition with which he may disagree. *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *Miami Herald Publ. Co.* v. *Tornillo*, 418 U.S. 241 (1974). Compulsory access to the billing envelope for four months of the twelve-month cycle denies the utility its right to refrain from advocacy on those occasions. Additionally, in denying PG&E access to its billing envelope for messages of its own during the period assigned to TURN, CPUC regulates the content of speech by favoring TURN's message, whatever it may be, to the message of PG&E.

(4) Less Instrusive Measures Are Available to Promote the State Interest Than Compulsory Insertion In Billing Envelopes of the Messages of Private Parties

If protected speech of a utility company is to be regulated the State must demonstrate that regulation serves a compelling State interest and that its regulation is narrowly drawn. *Consolidated Edison Co.* v. *Public Service Comm'n, supra; Central Hudson Gas & Electric Co.* v. *Public Service Comm'n, supra.* The State interest identified by CPUC for its regulation here is that the State has an interest in regulating monoply utilities, Appendix, at 26-27, and further that ratepayers will benefit more from exposure to a variety of views than they will from only those of PG&E. Appendix, at A-17.

An interest in regulating monoply utilities is not in itself a compelling state interest permitting regulation of speech in light of the *Consolidated Edison* and *Central Hudson* decisions of this Court which hold that privately owned utility companies enjoy the guarantees of the First Amendment. As to the state interest in the ratepayer being informed, that desirable goal was held inadequate to support state regulation of speech in *Miami Herald Publ. Co.* v. *Tornillo, supra.* While approving a broad airing of views by the press as a laudable goal, the Court observed that "press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." 418 U.S. at 256.

Alternative methods exist for promoting greater ratepayer participation in CPUC proceedings and greater awareness on energy issues. The most obvious alternative to forcing PG&E to publish TURN's fund solicitations is direct subsidization by CPUC and, indeed, as the dissenting CPUC Commissioner notes, CPUC rules provide for the award of intervenor's fees. TURN itself has in the past been

awarded fees for its participation in ratemaking proceedings before CPUC. Appendix, at A-56. The greater use of such authority might eliminate the need perceived by CPUC to encourage ratepayer participation through a restriction on PG&E's speech.

Seeking to play down its extraordinary intrusion into First Amendment rights of PG&E, CPUC provided a supplemental basis for its order in responding to PG&E's application for rehearing, noting that it has repeatedly exercised jurisdiction over the billing space to mandate insertion of legal notices such as notices of public hearings, notices of energy conservation programs, and the like. Appendix, at A-48. Having routinely required the billing space to be used for the benefit of ratepayers, CPUC asserts, the order compelling PG&E to permit the insertion of TURN messages is simply the acceptance by CPUC of another use of the space for the benefit of ratepayers.

But the CPUC order compelling insertion in PG&E's billing envelopes of fund solicitations and other messages of a private consumer group differs profoundly from PG&E orders compelling the insertion of legal notices. According to CPUC, it will undertake no control of the material inserted by TURN in PG&E's billing envelope. TURN material thus may cover any subject that organization wishes to address. One of the essential vices of the means chosen by CPUC is that responsibility for inserted messages passes out of the hands of an organ of government and into private hands, with interesting results for PG&E. If a notice mandated by CPUC itself for insertion is defamatory of PG&E or a third party or is plainly erroneous, PG&E would be entitled to test the legality of the insert order in a legal proceeding. State bodies such as CPUC have no rights under the First Amendment but instead possess such powers as are conferred on them by the legislature or the

people. Their orders may not exceed their authority, and such bodies may not embark on unauthorized activity. Legal notices, in other words, must be legal.

Private groups such as TURN, by contrast, possess rights. If defamatory or erroneous materials were submitted to PG&E by TURN, any attempt to restrict its publication would almost certainly be deemed a prior restraint forbidden by the First Amendment. It is evident from the foregoing that an order requiring PG&E to publish TURN speech is profoundly different from an order requiring PG&E to publish legal notices. As a general matter the delegation of regulatory power to private groups is out of keeping with the spirit of democratic institutions but this particular specimen is especially obnoxious insofar as it forces PG&E to publish private views over which it has no control and, as a matter of First Amendment law, can exercise no restraint. Under the CPUC order, therefore, the reversal of roles and accompanying rights is complete.

CONCLUSION

The order of the California Public Utilities Commission constitutes an abridgment of the freedom of speech guaranteed Pacific Gas and Electric Corporation by the First Amendment and should be struck down.

Respectfully submitted,

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PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION,
CONSUMERS UNION,
CONSUMER FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether decisions of the California Public Utilities Commission violate the First Amendment of the U.S. Constitution by compelling an investor-owned utility to disseminate in its monthly billing envelope the communications of a third party.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION,
CONSUMERS UNION,
CONSUMER FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Edison Electric Institute (EEI) hereby submits its brief *amicus curiae* in support of Appellant Pacific Gas and Electric Company (PGandE). Appellant requests this Court to reverse the final judgment of the Supreme Court of California denying a writ of review of decisions of the Public Utilities Commission of the State of Cali-

fornia (Commission) and to direct that court to vacate the Commission decisions. EEI supports Appellant because those decisions violate First Amendment rights under the United States Constitution by compelling Appellant to disseminate in its monthly billing envelope the communications of a third party.

EEI has obtained the written consent of all parties to this case for the filing of this brief pursuant to Rule 36.2 of this Court. The written consents have been filed with the Clerk of the Court.

INTEREST OF EDISON ELECTRIC INSTITUTE

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve approximately 96 percent of all customers of the investor-owned segment of the electric utility industry and 73 percent of the nation's electricity users.

EEI member companies have a substantial interest in this case because of the significant constitutional principles at stake. The Commission decisions involve fundamental First Amendment rights. Those rights will be violated when, pursuant to the Commission decisions, a utility is deprived of the customary use of its billing envelope to communicate with its customers, or is forced to send the messages of a third party in the envelope and is thereby compelled to speak when it ordinarily would not do so.

EEI and its members undertake many programs to enhance public understanding of the utility business and support increased consumer understanding of energy issues and utility ratemaking. State regulatory commissions are similarly interested in advancing public understanding in these areas. EEI members must object, however, whenever regulation designed to accomplish these objectives violates their First Amendment or other constitutional rights.

The constitutional questions arising in the instant case are present in actions that have been taken or considered in at least eighteen states.[1] An increasing interest in obtaining access to utility mailings has been evident in recent years. Because of this trend and its implications, EEI members have a strong interest in having this Court uphold their First Amendment rights in the face of these actions and proposals.

SUMMARY OF ARGUMENT

The constitutionality of the Commission decisions cannot be determined by application of standards governing reasonable time, place, or manner regulation of speech. Rather, the decisions compelling PGandE to disseminate the messages of a third party and to associate with that party's views result in an abridgment of First Amendment rights that must be evaluated under the most rigorous constitutional standards. Moreover, even if the Court were to employ the time, place, or manner test for evaluating the constitutionality of the Commission decisions, those decisions would fail to satisfy that test's requirement that the regulation of speech be content neutral.

The constitutional standard that must govern this case requires a compelling state interest in regulating speech and a narrowly drawn means to achieve that end. Neither element has been demonstrated by the Commission.

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[1] We previously noted fifteen jurisdictions in which state legislatures and commissions have been and are considering proposals to create citizen utility boards with authority to include their messages in utility billing envelopes or to authorize consumer groups to do the same. Brief of Edison Electric Institute as *Amicus Curiae* in Support of the Jurisdictional Statement at 4-6. We have since become aware of three additional jurisdictions in which the insertion of third-party messages in billing envelopes has been considered. *Vermont Public Interest Research Group, Inc.* v. *Central Vermont Public Service Corp.*, 39 PUR 4th 59 (Vt. P.S.B. 1980); H.B. No. 1143, 1985 Sess., Hawaii; S-1244, A-1460 and A-1468, 1984-85 Sess., New Jersey.

Finally, inclusion of regulatory notices in the billing envelope in the past will not support the Commission's present infringement of First Amendment rights. The billing envelope is the property of PGandE, and not a non-public forum under government ownership or control, and may be used by PGandE to the exclusion of all third parties.

ARGUMENT

EEI fully endorses the arguments presented in the Brief of Appellant Pacific Gas and Electric Company. PGandE's brief demonstrates that its First Amendment rights have been violated in two fundamental ways: its right to speak has been abridged, and its concomitant right not to speak or be associated with the speech of others has been infringed. This brief will not repeat all of the arguments made by PGandE. Rather, it will selectively focus upon arguments which we believe will assist the Court in its deliberations.

I. THE TIME, PLACE, OR MANNER DOCTRINE DOES NOT PROVIDE A BASIS FOR UPHOLDING THE COMMISSION DECISIONS.

The Commission asserts that its decisions comply with standards governing "reasonable time, place, or manner" restrictions on speech. Dec. No. 83-12-047, slip op. at 27-28; Jurisdictional Statement (J.S.) app. 20-21. In doing so, the Commission invokes this Court's opinion in *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980), where, indeed, the test for a permissible time, place, or manner restriction was articulated and applied. However, the Commission decisions reveal a fundamental misunderstanding of the holding of *Consolidated Edison* and the limitations imposed by the First Amendment upon governmental regulation of speech. The Commission has erred in two ways. First, the Commission has regulated speech based upon the content of the expression. Second, the Commission has done far more

than impose a restriction on PGandE's ability to express its own views. It has ordered PGandE to speak by disseminating the messages of Toward Utility Rate Normalization (TURN) when PGandE would otherwise choose silence.

A. The Commission Decisions Fail To Satisfy The Requirement That Time, Place, Or Manner Regulation Be Content Neutral.

As a threshold matter "a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Consolidated Edison*, 447 U.S. at 536 (footnote omitted). In that case the Court found that a ban on bill inserts addressing controversial issues of public policy could not be upheld as a reasonable time, place, or manner regulation because the government had placed itself in the position of ultimate arbiter of what information could be sent by a utility in its billing envelope. The state, in short, had regulated speech based upon its content, dictating what was useful information and what was prohibited. The Court unequivocally held such restriction on a utility's rights of speech "cannot be upheld as a content-neutral time, place, or manner regulation." *Id.* at 537.

Here too the Commission regulation is based upon content. The Commission decisions favor TURN's viewpoints at the expense of PGandE's, with the Commission as arbiter selecting the viewpoint it feels best serves its conception of the public interest. This Court has ruled repeatedly that the government may not regulate speech based upon content, *i.e.*, in a manner that favors one speaker over another based upon the content of their speech. *Consolidated Edison*, 447 U.S. at 535-36; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972) (unconstitutional to give special status to labor picketing); *Regan* v. *Time, Inc.*, —— U.S. ——, 104 S.Ct. 3262, 3266-67 (1984) (federal statute allowing one type of reproduction of U.S. currency and prohibiting an-

other based upon educational content of message ruled unconstitutional).

The Commission stated that its primary purpose was to determine "how to use the economic value of the extra space more efficiently for the ratepayers' benefit." Dec. No. 83-12-047, slip op. at 28; J.S. app. 21. *See also id.* at 6; J.S. app. 4. From the outset, the Commission's goal was to change the existing use of the billing envelope to allow a use which it considered "more efficient," and to benefit ratepayers by exposing them to a wider variety of views than they would otherwise receive from Appellant through its bill inserts. *Id.* at 23; J.S. app. 17. In *Consolidated Edison*, 447 U.S. at 537, this Court rejected the argument that a content ban on certain utility speech could be justified on the ground that it assured that "consumers will benefit from receiving 'useful' information." Similarly, in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247-48 (1974), the Court rejected a right to reply in a newspaper grounded on the assertion of a governmental obligation to ensure that a wide variety of views reaches the public. In this case the constitutional concern is that the state regulation relies upon a determination as to the value of one speaker's viewpoint versus that of another's.

The conclusion that the Commission engaged in prohibited content analysis is inescapable. Without evaluating the value of Appellant's and TURN's differing viewpoints, the Commission could not have concluded that inclusion of TURN's messages in the billing envelope four times per year would be a more beneficial use of space in the envelope than Appellant's continued use of its own billing envelope on those occasions. By favoring the inclusion of TURN's messages and displacing Appellant's, the Commission has made an impermissible and unconstitutional judgment about the content of Appellant's speech.[2]

[2] We have not addressed whether the Commission decisions have satisfied two other criteria in the test for a valid time, place, or manner restriction on speech, *i.e.*, whether it is narrowly tailored to serve a significant governmental interest and whether it leaves open alternative channels for communication. *Regan*, 104 S.Ct. at 3266-67; *United States* v. *Grace*, 461 U.S. 171, 177 (1983). Assuming *arguendo* that those requirements were met and the restriction on Appellant's speech were deemed to be content neutral, the state's regulation would still be unconstitutional. The Commission cannot rely, as it has attempted to do here, upon cases that have validated reasonable time, place, or manner regulation of speech on public property or at a public forum. Decision No. 83-12-047, slip op. at 27-28, J.S. app. 20-21; Commission Motion to Dismiss at 17-20. See *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (speech on streets, alleys, and thoroughfares); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (speech on jail grounds); *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981) (speech at state fairgrounds). As discussed in Brief of Edison Electric Institute As Amicus Curiae In Support of The Jurisdictional Statement at 16-17, and Brief of Appellant Pacific Gas and Electric Company at 31-33, Appellant's billing envelopes are its own private property and not the property of ratepayers, the Commission, or any governmental entity. Nor has Appellant held the billing envelopes open to the public. Accordingly, the limited precedent authorizing reasonable time, place, or manner restrictions on speech occurring at public forums will not provide any cognizable basis for the restriction on Appellant's speech.

B. The Constitutionality Of An Order Compelling PGandE To Speak When It Seeks To Refrain From Speaking Is Not Governed By Standards Applicable To Time, Place, Or Manner Regulation.

The gravamen of a time, place, or manner regulation of speech is that it limits the exercise of an existing right of expression. Thus, in narrow circumstances, the government may limit the time, place, or manner in which individuals exercise their First Amendment rights by, for example, regulating access to public parks or facilities for purposes of speaking, or prohibiting sound trucks which emit loud or raucous noises on city streets. See, *e.g.*, *Clark* v. *Community for Creative Non-Violence*, —— U.S. ——, 104 S.Ct. 3065 (1984); *Kovacs* v. *Cooper*, *supra*. The essence of time, place, or manner regulation "lies in the recognition that various methods of speech,

regardless of their content, may frustrate legitimate governmental goals." *Consolidated Edison*, 447 U.S. at 536. Nothing in this case even remotely suggests, however, that PGandE's speech frustrates any legitimate governmental objectives. Rather, PGandE's speech, that is, its ability to disseminate its own words, is being restricted so that the voice of another may be heard. While this arguably may be a constitutionally acceptable result when the competing voices seek mutually exclusive use of public facilities, as in the case of parade and demonstration permits for public streets and parks, the facts here are significantly different.

PGandE's ability to use its billing envelope to communicate its own views is being restricted, and for reasons discussed above (see pp. 5-6, *supra*) this itself is an unconstitutional abridgment of its rights of expression. But even if one were to assume that the regulation restricting PGandE's First Amendment right to express its own views could otherwise satisfy the time, place, or manner standards, the Commission decisions would still fail to pass constitutional muster. Simply put, the time, place, or manner doctrine cannot be invoked to justify the Commission decisions because PGandE is being compelled to speak and to transmit TURN's messages in the billing envelope. This compulsion goes far beyond acceptable regulation which restricts the time, place, or manner of PGandE's speech. The Commission is not merely negating PGandE's ability to speak through its billing envelope, although this may well be one result of its decisions: it is also compelling PGandE to undertake the affirmative act of speaking and associating with TURN's views when PGandE would refrain from doing so absent state compulsion. The constitutionality of such compulsion cannot be determined by reference to standards applicable to a time, place, or manner restriction.

In *United States* v. *Grace*, 461 U.S. 171 (1983), this Court discussed the limited circumstances in which the time, place, or manner doctrine may be applied, and the

stricter standard that must be satisfied when the governmental invasion of the First Amendment freedom of expression goes beyond those limitations.

> It is also true that "public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." . . . In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." . . . *Additional restrictions* such as an absolute prohibition on a particular type of expression *will be upheld only if narrowly drawn to accomplish a compelling governmental interest.*

Id. at 177 (citations omitted and emphasis added). Clearly, a content-based restriction on speech and a governmental compulsion to speak or associate with the views of another are profound intrusions into First Amendment freedoms which demand scrutiny under the most stringent constitutional standards.

II. THE COMMISSION'S REGULATION OF PGandE's SPEECH IS NOT A NARROWLY TAILORED MEANS OF SERVING A COMPELLING STATE INTEREST.

The standard against which the Commission decisions must be weighed was articulated clearly by this Court in *Consolidated Edison:* a restriction on a utility's speech based upon content will survive only if it is a "narrowly tailored means of serving a compelling state interest." 447 U.S. at 535. Similarly, in *Wooley* v. *Maynard*, 430 U.S. 705, 716-17 (1977), this Court ruled that governmental action compelling an individual to disseminate the message of another will be sustained only if based upon

a compelling state interest that cannot be achieved by narrower means which are less restrictive of First Amendment rights.[3] The Commission has failed to demonstrate that its interest in regulating PGandE's speech is "compelling" or that its means of doing so is "narrowly tailored." Therefore, the Commission decisions cannot be sustained.

A. The State Interests Identified By The Commission Are Not Sufficiently Compelling.

The Commission stated the interests to be served by its decisions as "the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete [consumer] understanding possible of energy-related issues." [4] Dec. No. 83-12-047, slip. op. at 29; J.S. app. 22, *quoting* Dec. No. 83-04-020, slip op. at 17; J.S. app. 103. While these goals may be worthwhile, there can be no doubt that they fall far short of passing the compelling interest test.

[3] *Wooley* articulated the additional constitutional precondition, in the context of governmental efforts to compel individuals to carry the message of a third party, that the governmental interest underlying the regulation be ideologically neutral. In *Wooley*, 430 U.S. at 717, the regulation failed because the state's interest was dissemination of an ideological viewpoint. Similarly, the Commission in this case fosters a particular ideology, that of TURN. Notwithstanding the Commission's official pronouncements, the Commission cannot successfully contend that its interest in allowing TURN to obtain greater distribution of its viewpoints is "ideologically neutral." While the Commission has stated its interests as greater consumer participation in its proceedings and enhanced knowledge of energy issues, the Commission in practice has singled out a group with a particular ideological bent and given them access to the avenue of communication provided by Appellant's billing envelopes. Even if the Commission's generally stated interests are neutral, the manner in which the interests have been pursued, by using TURN as the mouthpiece, is not ideologically neutral. For this reason alone, the regulation cannot withstand constitutional scrutiny.

[4] These two interests, and not the litany of purported objectives recited by the Commission in its Motion to Dismiss at 17-18, are the sole and exclusive interests cited by the Commission decisions and, accordingly, are those which this Court should consider as the Commission's basis for regulating PGandE's speech.

The Commission's interests pale by comparison to interests determined to be non-compelling by this Court. *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (maintaining strict separation of church and state); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978) (sustaining active role of individual citizen in electoral process to maintain confidence in government and protecting shareholders whose views differ from those expressed in the political arena by corporate management). In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the government sought to limit campaign expenditures by federal political candidates, including expenditures made from their own personal resources. One of the governmental interests served by the expenditure ceilings was "equalizing the relative ability of individuals and groups to influence the outcome of elections. . . ." *Id.* at 48.

The governmental interest in *Buckley* is not unlike the objectives asserted by the Commission. In each instance the interest involves promoting balanced representation in a governmental decisionmaking process by enhancing the abilities of participants to influence the outcome. Yet in *Buckley* this Court found that equalizing participation in the electoral process was insufficient to justify the attendant infringement of fundamental First Amendment rights. The interest failed because "the concept that the government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Id.* at 48-49. So too in this case the governmental interest in widespread distribution of information and participation in Commission proceedings may not be served at the expense of Appellant's First Amendment freedoms.

B. The Means Employed By The Commission To Serve The State's Interests Are Not Narrowly Tailored Because A Panoply Of Less Repressive Means Is Readily Available.

Even if the state's interest in repressing Appellant's own speech and directing PGandE to distribute TURN's messages were somehow compelling—a proposition which we vigorously dispute—the Commission decisions still must fail. *Consolidated Edison* and *Wooley* require that the means selected to accomplish a compelling state interest be narrowly drawn. If a state has available a variety of means to achieve the desired end, it must choose the alternative which is least restrictive of First Amendment interests. *See Shelton* v. *Tucker*, 364 U.S. 479 (1960) (state statute unconstitutional because state interest in fitness and competence of publicly employed teachers could be served by means narrower than requirement that teachers report annually all organizations with which they have been associated over five-year period).

In this case, the state has before it a panoply of available alternatives which would further the Commission's objectives without infringing Appellant's First Amendment rights. For example, representation of consumer interests in Commission proceedings could be accomplished by enhanced state funding of the Commission's staff or direct funding of other entities. The state legislature could create a new entity with the sole objective of expanding consumer representation in Commission proceedings.[5] Moreover, consumer messages could be disseminated in state mailings, such as those which transmit tax returns or vehicle registration forms, or in public

[5] The state, for example, could create a consumer protection board, as is the case in New York (N.Y. Exec. Law § 550 *et seq.* (McKinney 1982)), or establish an agency specifically to represent the interests of ratepayers at public utility commission proceedings, as is done by the District of Columbia Office of People's Counsel. D.C. Code Ann. § 43-406 *et seq.* (1981).

service broadcast announcements. Similarly, the interest in developing understanding of energy-related issues could be accomplished by dissemination of information by the Commission itself or other state agencies, such as the California State Energy Resources Conservation and Development Commission. The state could employ its vast educational system as well to educate the public in this regard.

This Court has repeatedly held:

> [E]ven though the governmental purpose [is] legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton, 364 U.S. at 488 (footnotes omitted). The option selected in the Commission decisions is unconstitutional because it does not comply with this Court's longstanding mandate that the government adopt the least restrictive means of achieving its goal.

III. PAST INCLUSION OF LEGAL NOTICES IN THE BILLING ENVELOPE DOES NOT JUSTIFY THE COMMISSION'S REGULATION OF PGandE's SPEECH.

The Commission cannot legitimize the abridgment of PGandE's First Amendment rights by referring to prior inclusion of Commission-directed legal notices in the billing envelope. Dec. No. 84-05-039, slip op. at 3; J.S. app. 46-47. If probative of anything, such past practice explains only the evolution of the Commission's exercise of regulatory authority over the billing envelope and Appellant's acquiescence to the Commission's assertion of authority. This, of course, is a matter of state law which is neither before this Court nor precedent for the resolution of the constitutional issues raised by the Commission decisions.

Past Commission orders directing the inclusion of regulatory notices in the billing envelope (*e.g.*, availability of conservation programs and information, notices of applications for rate increases or of public hearings) are readily distinguishable from a requirement that PGandE publish or disseminate TURN's messages. First, the state's interest in disseminating notice of rate and service-related matters to utility customers differs significantly from its interest in establishing the self-appointed consumer group TURN as a funded participant in rate cases. The interest of ratepayers in receiving notice of potential changes in service or rates is more akin to a right of procedural due process which arguably may be compelling. Clearly, the state's interest in seeing that TURN's messages are transmitted has nothing to do with due process rights, and as demonstrated above (see pp. 10-11, *supra*), the interest is not otherwise compelling. Second, the specific means used to accomplish the notification of individual ratepayers of changes in rates and service are much more narrowly drawn than the indiscriminate access given to TURN by the Commission decisions. Indeed, the nexus between the Commission's avowed interests and the unfettered license granted to TURN to use PGandE's billing envelope is attenuated at best.

IV. THE LIMITED DOCTRINE ALLOWING GOVERNMENT TO RESTRICT SPEECH ON ITS OWN PROPERTY DOES NOT SUPPORT THE COMMISSION DECISIONS.

While past practice suggests that notice of rate and service changes has been included within the billing envelope, the Commission, by bootstrapping from its prior regulation of the billing process, cannot legitimately claim that utility billing envelopes are a "nonpublic forum on property 'owned or controlled by the government'." Commission Motion to Dismiss at 22. For obvious reasons the envelope and space within it cannot be considered

public property. And because the billing envelope and space within it are the private property of Appellant,[6] the Commission may not invoke the special proprietary interests cited in a limited class of cases to justify governmental restrictions on speech that bar access to public property which is not a public forum, or that allow the government to select among speakers on such property. See, *e.g.*, *Greer* v. *Spock*, 424 U.S. 828 (1976) (military base); *Adderley* v. *Florida*, *supra* (jail grounds); *City Council* v. *Taxpayers for Vincent*, —— U.S. ——, 104 S.Ct. 2118 (1984) (city-owned utility poles).

Specifically, this Court's ruling in *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983), is inapposite. In *Perry* the government gave access to an interschool mail system to one collective bargaining unit while excluding a rival union from such access. The *Perry* decision stands for the proposition that the government, because of its strong proprietary interest in certain public property, may condition speech on such property where it has not traditionally been held open as a public forum. This Court made clear in *Perry*, however, that "in *Consolidated Edison*, which concerned a utility's right to use its own billing envelopes for speech purposes, the Court expressly distinguished our public forum cases, stating that '*the special interests of a government in overseeing the use of its property' were not implicated.*" 460 U.S. at 50-51 n.9 (emphasis added). In this case, as in *Consolidated Edison*, the use of a utility's private property is involved, and precedent supporting exceptional regulation of a governmentally-owned but nonpublic forum will not support the Commission decisions.

---

[6] The fact that public utilities are regulated or that customers pay through their rates for service does not change the nature of the utilities' property interest in materials and facilities used to provide that service. See, *e.g.*, *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23, 32 (1926); *United Railways and Electric Co. of Baltimore* v. *West*, 280 U.S. 234, 249 (1930) (overruled on other grounds in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 606-07 (1944)).

CONCLUSION

For the foregoing reasons, *amicus curiae* Edison Electric Institute respectfully urges the Court to reverse the judgment of the Supreme Court of California and to direct that court to vacate the Commission decisions.

Respectfully submitted,

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October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AS *AMICUS CURIAE*

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No. 84-1044

IN THE

Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AS *AMICUS CURIAE*

Consolidated Edison Company of New York, Inc. (Con Edison) respectfully submits this brief as *amicus curiae* in support of appellant Pacific Gas and Electric Company (PGandE) and urges that the judgment of the Supreme Court of California be reversed because it violates PGandE's freedom of speech guaranteed by the First Amendment to the United States Constitution.[1]

Interest of *Amicus Curiae*

Con Edison is an investor-owned utility that provides electric, gas and steam service in various parts of New York City and Westchester County in New York State. As a public utility, Con Edison is subject to regulation by the Public Service

[1]Pursuant to Rule 36.2, there have been filed with the Clerk the written consents of all parties to the case.

Commission of the State of New York (New York PSC) in the conduct of its utility business.

Con Edison believes that the First Amendment secures to it both the right to speak freely on public issues and the right to remain silent about such issues, and it is committed to protecting these rights against unlawful governmental interference.

Con Edison was the appellant in *Consolidated Edison Company of New York, Inc.* v. *Public Service Commission*, 447 U.S. 530 (1980) (*Con Edison* v. *PSC*), the case in which this Court invalidated, as violative of the First Amendment, an order of the New York PSC prohibiting utilities from disseminating in their billing envelopes their views on controversial public issues. This case involves the converse of the issue presented in *Con Edison* v. *PSC*: may the Public Utilities Commission of the State of California (PUC) compel a public utility (PGandE) to disseminate the messages of a third party in the utility's billing envelopes.

Con Edison believes that a compulsion to speak is as destructive of the freedom of speech as a prohibition against speaking, and it is interested in this case because it wishes to assure that the protections recognized in *Con Edison* v. *PSC* for the utilities' speech are not diminished.

Con Edison is interested in this case for the additional reason that the New York PSC has adopted an order very similar to the one adopted by the PUC, and the decision in this case may determine the validity of the New York PSC's order.[2]

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[2]Case 28655, *Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes* (N.Y. P.S.C. May 14, 1984), *reh'g denied* (Nov. 14, 1984). The New York PSC's order is reprinted in the appendix to PGandE's jurisdictional statement. J.S. App. A111.

Con Edison and several other New York utilities challenged the New York PSC's order on the grounds that it violates their First and Fifth Amendment rights under the United States Constitution. The New York Supreme Court, Albany County, agreed with the utilities' First Amendment arguments, and it declared the New York PSC's order unconstitutional. *Consolidated Edison Company of New York, Inc.* v. *Public Service Commission*, No. 10762-84 (April 10, 1985). An appeal to the Appellate Division, Third Department, is pending.

Summary of Argument

The PUC's order implicates PGandE's freedom of speech by diminishing its ability to communicate its own views and by requiring it to disseminate the views of others. The PUC's order, being a content-based regulation of speech, may be upheld only if the PUC can show that its "regulation is a precisely drawn means of serving a compelling state interest." *Con Edison* v. *PSC*, 447 U.S. at 540. The PUC has not met this burden. The governmental interests it relies upon are either not substantial, are not advanced by its order, or could be served by less restrictive means.

Argument

THE PUC's ORDER REQUIRING PGandE TO DISSEMINATE THE MESSAGES OF A THIRD PARTY IN PGandE's BILLING ENVELOPES VIOLATES PGandE's FREEDOM OF SPEECH.

A. General First Amendment Principles

Content-based regulation of speech is "presumptively unconstitutional," *Minneapolis Star* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983), and will be sustained "only in the most extraordinary circumstances." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983). Such regulation will be upheld "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Con Edison* v. *PSC*, 447 U.S. at 540.[3]

In Part C, we shall show that the order under review is a content-based regulation. In Part D, we shall show that the PUC has not established that its order serves a compelling state interest or that its order is a precisely drawn means of achieving its stated purpose. Before turning to these issues, we shall

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[3]The PUC's order suppresses political speech at the core of the First Amendment, J.S. App. A66; some of the speech favored by the PUC will also be political speech at the core of the First Amendment. An order regulating such speech requires the strictest degree of judicial scrutiny. *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 294 (1981).

respond, in Part B, to appellees' argument that the PUC's order does not even implicate PGandE's First Amendment rights.

B. The PUC's Order Implicates PGandE's First Amendment Rights.

The PUC's order implicates PGandE's First Amendment rights in two ways. First, it diminishes PGandE's ability to speak by displacing PGandE's messages with the messages of Toward Utility Rate Normalization (TURN) in the extra space in PGandE's billing envelopes.[4] Second, it compels PGandE to speak when it would rather remain silent.

1. The right to speak

The First Amendment protects the right to speak. *Con Edison* v. *PSC*. However, the PUC and the other appellees (TURN and others) argue in their motions to dismiss (M.D.) that the order under review does not implicate PGandE's right to speak because PGandE remains free to communicate with its customers on any topic so long as it does so in space other than the extra space in its billing envelopes and pays the additional postage. PUC's M.D. 15-16; TURN's M.D. 5-10.[5] However, PGandE has been deprived of the use of the extra space in its billing envelopes, and it has long been settled that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S. 147, 163 (1939); *see*

[4]The PUC defined "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." Appendix to Motion to Dismiss of the PUC (PUC App.) A3. How much of the extra space TURN uses is solely within its discretion. PUC App. A38, ¶ 5(a).

[5]We estimate that under appellees' suggestion, each mailing requiring extra postage would cost PGandE an additional $630,000. This assumes that PGandE mails each issue of *Progress* to 3.7 million customers (J.S. 4) and that the additional postage for the second ounce of the mailing is 17 cents per customer.

Because the cost of the second ounce of postage is approximately the same as the cost of the first ounce, the economic effect of adopting appellees' suggestion is the same as requiring PGandE to send its messages in a separate envelope. This proposal was implicitly rejected by the Court in *Con Edison* v. *PSC*.

also Bolger v. *Youngs Drug Products Corp.*, 463 U.S. at 69 n.18; *Virginia State Board of Pharmacy* v. *Virginia Consumer Council*, 425 U.S. 748, 757 n.15 (1976).[6] Thus, the PUC cannot escape strict scrutiny of its order by arguing that PGandE can exercise its right to speak in some other place.

2. The right to remain silent

The First Amendment also protects the right to remain silent. In *Wooley* v. *Maynard*, 430 U.S. 705 (1977), this Court held that a state may not constitutionally require an individual to disseminate an ideological message to which the individual objects:

> where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

Id. at 717 (footnote omitted).

Compelled dissemination of an ideological message, the Court concluded in *Wooley* v. *Maynard*, would require the individual to foster an idea he finds objectionable and would violate the individual's right to refrain from speaking. *Id.* at 714-15.[7]

[6]TURN also argues that requiring PGandE to pay the extra postage four times a year is less burdensome than charging PGandE's stockholders all costs of mailing *Progress*, an approach, TURN contends, the PUC could have adopted. TURN's M.D. 9-10. However, it is far from clear that such an approach would be constitutional. This Court expressly left open this question of cost allocation in *Con Edison* v. *PSC*, 447 U.S. at 543 n.13, and it is presently being considered in *Consolidated Edison Company of New York, Inc.* v. *Public Service Commission*, 107 A.D.2d 73, 485 N.Y.S.2d 607 (N.Y. App. Div., 3d Dept., Feb. 21, 1985), *appeal pending*.

Moreover, how the costs of mailing *Progress* are allocated between the utility's ratepayers and stockholders has no relevance to the validity of the PUC's order. Under the PUC's order, TURN is entitled to access to PGandE's billing envelopes whether or not PGandE sends *Progress* to its customers.

[7]As the Court observed in *Wooley* v. *Maynard*, "[t]he right to speak and the right to refrain from speaking are complementary

Similarly, in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (*Miami Herald*), this Court struck down a Florida statute requiring a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. That decision, the Court later said, stands for the principle "that the State cannot tell a newspaper what it must print." *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 88 (1980) (*PruneYard*).[8]

Appellees argue that PGandE's right to remain silent is not implicated because TURN's views are not likely to be identified with those of PGandE. PUC's M.D. 23-24; TURN's M.D. 21. However, the First Amendment problem with the PUC's order is more fundamental than the mistaken attribution of beliefs;[9] the problem is governmental coercion to disseminate ideas and the resulting distortion of the marketplace of ideas.

A central purpose of the First Amendment is to protect the marketplace of ideas against governmental interference. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also Con Edison* v. *PSC*, 447 U.S. at 537-38; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86

components of the broader concept of 'individual freedom of mind.'" *Id.* at 714, *quoting Board of Education* v. *Barnette*, 319 U.S. 624, 637 (1943). *See also Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 53 U.S.L.W. 4562, 4567-68 (U.S. May 20, 1985); *Minnesota State Board for Community Colleges* v. *Knight*, 104 S. Ct. 1058, 1079-80 (1984) (Stevens, J., dissenting); *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 97-100 (1980) (Powell, J., concurring); *Herbert* v. *Lando*, 441 U.S. 153, 178 n.1 (1979) (Powell, J., concurring); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 234-35 (1977); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974).

[8] It is settled that "[t]he liberty of the press is not confined to newspapers and periodicals . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938).

[9] There was very little possibility of mistaken attribution of views in either *Wooley* v. *Maynard* or *Miami Herald*; yet in both cases the Court invalidated state statutes requiring persons to disseminate the views of others.

(1978); *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). Of course, the government can distort the marketplace of ideas just as much by restricting the voices of some as by enhancing the voices of others. Accordingly, this Court's decisions have established the principle that "the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council* v. *Taxpayers for Vincent*, 104 S.Ct. 2118, 2128 (1984); *see also Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 49 (1983). Similarly, in *Buckley* v. *Valeo*, the Court observed that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." 424 U.S. at 48-49. The PUC has clearly engaged in viewpoint discrimination by favoring TURN's views at the expense of the views of PGandE.

C. The PUC's Order Is a Content-based Regulation.

A content-based regulation is one that discriminates for or against certain topics or for or against certain viewpoints within a topic. *Con Edison* v. *PSC*, 447 U.S. at 537; *Carey* v. *Brown*, 447 U.S. 455 (1980). In this case, the PUC has engaged in viewpoint discrimination by favoring TURN's speech over the speech of PGandE.[10]

TURN is an organization that represents residential utility consumers. PUC App. A17. TURN was not awarded access on an ideologically neutral basis; TURN was given access precisely because of its views as a representative of residential customers.[11] By preferring TURN's use of the extra space to

[10] Justice Brennan has characterized viewpoint discrimination as "censorship in its purest form." *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. at 62 (dissenting opinion).

[11] The PUC is familiar with TURN's viewpoints. For example, TURN is in favor of keeping "rate of return and evaluation of rate base relatively low." PUC App. A18. TURN will not use PGandE's envelopes to argue that the rates charged to commercial customers are being used to subsidize lower rates for residential customers. Neither

PGandE's on the ground that to do so would be more beneficial to PGandE's customers, PUC App. A22, the PUC has clearly fostered the dissemination of a particular viewpoint. From the standpoint of ideological neutrality, the choosing of the message carrier by the government is as offensive as the choosing of the message.[12]

Prune Yard, a decision on which appellees rely heavily, does not require a contrary conclusion. Unlike the situation in this case, access to the shopping center in *Prune Yard* was not determined by the identity of the speaker or the content of the message. The Court emphasized in *Prune Yard* that there was "no danger of governmental discrimination for or against a particular message." 447 U.S. at 87.[13] Moreover, contrary to the facts in this case, the speakers' use of the shopping center in *Prune Yard* did not interfere with the owner's use of the property. *Id.* at 83.

D. The PUC Has Not Met Its Burden of Showing That Its Order Is a Precisely Drawn Means of Serving a Compelling State Interest.

The Constitution places on the government the burden of justifying its regulation of speech. *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 786. This Court has determined that the government's justifications must be subjected to strict and exacting judicial scrutiny. *Citizens Against Rent Control* v. *City of Berkeley,* 454 U.S. at 294; *Police Department of City of*

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will it advance any other proposition it would regard as adverse to the interests of residential customers.

[12] A municipality that allowed only one political party to use the public parks to seek new members could hardly answer a claim that it was violating the First Amendment by arguing that its action was ideologically neutral because it was not prescribing the messages of the chosen speaker.

[13] The PUC and TURN both argue that the order under review does not restrict PGandE's speech on the basis of its content. PUC's M.D. 17; TURN's M.D. 11-13. The Court responded to this argument in *Miami Herald* by noting that it "begs the core question. Compelling editors or publishers to publish that which ' "reason" tells them should not be published' is what is at issue in this case." 418 U.S. at 256.

Chicago v. *Mosley,* 408 U.S. 92, 99, 101 and n.8 (1972); *NAACP* v. *Button,* 371 U.S. 415, 438-39 (1963).

The PUC offers several purported justifications in support of its order. PUC's M.D. 17-18.[14] However, it has not come forward with any evidence in support of these justifications. Invalidation of its order is required for this reason alone. *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 789. Moreover, the governmental interests relied upon by the PUC are either not substantial, are not advanced by its order, or, as shown by PGandE in its brief, could be served by less restrictive means. Finally, the PUC's principal justifications (fuller understanding of issues by consumers and increased participation by them in PUC proceedings) are so vague that they are not susceptible of judicial review. If the PUC could meet its burden of proof merely by invoking such general objectives, freedom of speech would cease to exist. We shall now show that each of the PUC's asserted justifications for its order must be rejected.

1. Fuller understanding of energy- and regulatory-related issues by consumers

The PUC argues that its order "furthers the fuller understanding of energy- and regulatory-related issues by consumers." PUC's M.D. 17. The PUC has not demonstrated that this is a compelling state interest. There is no discussion by the PUC of the existing level of consumer understanding of energy- and regulatory-related issues by consumers, of why an increase in such understanding is necessary, of the extent to which such understanding ought to be increased, and of how TURN will fulfill this function.

More fundamentally, with the exception of the special case of the broadcast medium, this Court has repeatedly rejected the argument that a better informed public is an adequate justification for infringing speech. In *Con Edison* v. *PSC,* the Court

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[14] TURN has advanced most of these same justifications. TURN's M.D. 13-15.

rejected the New York PSC's asserted justification that its order will alow utility customers to receive more " 'useful' information." 447 U.S. at 537. In *Wooley* v. *Maynard,* the Court rejected New Hampshire's asserted justification that its statute "promotes appreciation of history, individualism, and state pride." 430 U.S. at 716.

The PUC's argument falls into familiar patterns. It asserts that displacing PGandE's messages with TURN's messages will benefit PGandE's consumers by exposing them to a wider variety of views. But achieving this goal by governmentally coerced dissemination of information "at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Miami Herald,* 418 U.S. at 254 (footnote omitted). Similarly, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley* v. *Valeo,* 424 U.S. at 48-49.[15]

2. Increased consumer participation in PUC proceedings

The PUC's second asserted justification for its order is that it promotes increased consumer participation in PUC proceedings. PUC's M.D. 17. This justification is no more compelling, no more specific, and is supported by no more evidence than the PUC's first asserted justification. For example, the PUC has neither explored the extent of existing consumer participation in its proceedings nor has it justified increasing the level of such participation. The fact is that the level of consumer participa-

[15] The PUC makes the related claim that its order is justified by reliance on the customers' right to receive ideas and information. PUC's M.D. 17-19. However, except in the case of the broadcast medium, this Court has never recognized a right to receive information absent a willing sender of information. The right-to-receive cases protect the communication against governmental interference; they do not create a right to force unwilling speakers to send information. *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972); *Stanley* v. *Georgia,* 394 U.S. 557 (1969); *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *Martin* v. *Struthers,* 319 U.S. 141 (1943).

tion in PUC proceedings is already extraordinarily high. Forty-seven parties, including TURN, representing every conceivable point of view, participated in PGandE's 1982 rate case. Decision 93887, 7 CPUC 2d 349, 519-20 (1981). Indeed, with far less participation in its proceedings, the New York PSC asked "whether there is a legitimate need for additional ratepayer representation." Case 28655, *Proceeding on Motion of the Commission to Examine Ratepayer Access to Utility Billing Envelopes and the Concept of a Citizens' Utility Board,* Order Instituting Proceeding 3 (Oct. 7, 1983).

3. Remedy for violation of PURPA

The PUC's third asserted justification for its order is that it provides a remedy for PGandE's violation of PURPA. PUC's M.D. 18.[16] This asserted justification should be rejected for several reasons.

First, the PUC is in error in concluding that "PGandE had engaged in political advertising in the *Progress* from time to time in violation of the PURPA prohibitions." PUC App. A3. PURPA is addressed to state regulatory authorities and requires them to *consider* adopting the advertising standard. However, as this Court made clear, "no state authority . . . is required to adopt or implement" the advertising standard. *FERC* v. *Mississippi,* 456 U.S. 742, 749-50 (1982). If the state regulatory authority decides to adopt the PURPA advertising standard, it will exclude from the utility's revenue requirement the cost of political advertising. However, as the legislative history of PURPA makes clear, "[a]doption of the [advertising] standard does not prohibit any utility from engaging in [political] advertising. The standard merely specifies who is to pay for the advertising." *Joint Explanatory Statement of the*

[16] The PUC is referring to the advertising standard of Section 113 of PURPA, 16 U.S.C. § 2623(b)(5) (1982), which provides that

> No electric utility may recover from any person other than the shareholders (or other owners) of such utility any direct or indirect expenditure by such utility for promotional or political advertising as defined in section 2625(h) of this title.

Committee of Conference, H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 63, 77, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7811. The PURPA advertising standard is violated by charging higher rates than allowed by the state regulatory authority; it is not violated by conducting political advertising. There is no allegation that PGandE charged higher rates than allowed by the PUC.

Second, if there be a violation of the advertising standard of PURPA, the remedy contemplated by PURPA is a reduction of the utility's rates and not an infringement of its freedom of speech.[17] An appropriate rate adjustment, rather than an infringement of speech, is also the constitutionally permissible answer to any forced subsidy argument. *Con Edison* v. *PSC,* 447 U.S. at 543.

Finally, if the PUC's order is to be construed, as the PUC suggests, as requiring PGandE to disseminate TURN's messages as a penalty for PGandE's dissemination of its own messages, the order violates *Miami Herald* by exacting a penalty from PGandE on the basis of the content of its speech. 418 U.S. at 256.

4. Halting misappropriation by PGandE of an asset belonging to the ratepayers

The PUC's fourth asserted justification for its order is that it halts misappropriation of an asset belonging to the ratepayers and prevents "unjust enrichment" by PGandE. PUC's M.D.

[17] It is far from clear that recovery of the minimum necessary cost of providing service, PUC App. A3, is a violation of the PURPA advertising standard. The existence of extra space in the utility's billing envelope does not add a penny to the cost of providing utility service. J.S. App. A67. Thus, the utility's use of that extra space does not require ratepayers to subsidize the utility. In any event, if PURPA is construed as permitting disallowance of a portion of the postage costs when the utility uses the extra space for political advertising, at no additional cost to ratepayers, then PURPA is of questionable constitutionality. *Consolidated Edison Company of New York, Inc.* v. *Public Service Commission,* 107 A.D. 2d at 77, 485 N.Y.S. 2d at 611 (Main, J.P., dissenting).

18.[18] This asserted justification should be rejected because the extra space does not belong to the ratepayers and, even if it did, the remedy adopted by the PUC is patently underinclusive.

The PUC reasoned that the extra space in utility billing envelopes belongs to ratepayers because its cost is included in the utility's revenue requirement. J.S. App. A72, ¶ 58.[19] However, it has long been established that

[18] Appellees argue that because the PUC's determination as to the ownership of the extra space was made in a prior PUC proceeding, that determination is "*res judicata*" and is not properly challenged on this appeal. PUC's M.D. 8-9; TURN's M.D. 18-19. This contention is in error. In the prior proceeding, the PUC determined only that the extra space in utility billing envelopes is "properly considered as ratepayer property." Decision 93887, J.S. App. A72, ¶58. In the prior case, the PUC did not take any action to implement this conclusion; rather, it contemplated further proceedings. *Id.* at A71, A72, ¶ 60; PUC App. A33, ¶5. ("This Commission in D.93887 declined to order PG&E to take any action to remedy the inequity created by its use of the extra space and the deprivation of the value of that space as to the ratepayers because the record was insufficient for the Commission to determine how the Commission could direct PG&E to use the extra space more efficiently for the ratepayers' benefit.") There was no final judgment in the prior case, which is a predicate to this Court's jurisdiction. 28 U.S.C. § 1257 (1982). Thus, review of the ownership question in this Court could not have been obtained prior to this appeal, and the issue is properly presented on this appeal.

[19] We should note that although the PUC *claims* that the extra space is ratepayer property, it has not *treated* the extra space as such property. The PUC has granted access to the extra space to some customers, but denied access to others. Decision 84-10-062 (Oct. 17, 1984), J.S. App. A157. Even those customers that have been granted access to the extra space have only a limited right to the use of such space, and they have such right only for two years. PUC App. A38. Moreover, such customers have no right to sell, lease, transfer or exercise any other incident of ownership as to such extra space.

The PUC's granting of access to the extra space to some customers, but not to others, constitutes an additional basis for reversal of the judgment of the court below. The statutes pursuant to which the PUC is acting, PUC App. A57-59 are so vague as to provide no standards to the PUC in exercising its discretion. *Niemotko* v. *Maryland,* 340 U.S. 268, 271-73 (1951); *Lovell* v. *Griffin. See also* L. Tribe, *American Constitutional Law* 733-34 (1978). ("[T]he Supreme Court has consistently [invalidated] statutes containing essentially standardless delegation in areas affecting first amendment rights.")

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.

Board of Public Utility Commissioners v. *New York Telephone Co.*, 271 U.S. 23, 32 (1926). More recently, in *Con Edison* v. *PSC*, the Court followed this rule when it recognized that the billing envelope was the utility's property. 447 U.S. at 540.

A state may not deprive a utility of its property simply by redefining property rights. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982). Moreover, "a State, by *ipse dixit*, may not transform private property into public property without compensation. . . ." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980).

Even if it be assumed that the extra space in the utility's billing envelope were ratepayer property, the remedy adopted by the PUC is patently underinclusive. The fact that a particular type of property has been singled out for special treatment by the PUC "undermines the likelihood of a genuine state interest" in protecting against "unjust enrichment" of the utility. *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 793. There is extra space in most, if not all, types of utility property: buildings, trucks, computers, office equipment, electrical equipment and many others. Yet, the PUC has done nothing to capture the value of the extra space in these properties for the benefit of ratepayers.[20] Moreover, the remedy adopted by the PUC is ineffective even in capturing the extra space in the billing envelopes. PGandE is allowed to use any extra space not used by TURN during the "TURN months," and it is also allowed to use the extra space in sixteen

[20] The suggestion that access be given to the public in the extra space on trucks was found unacceptable by this Court even as to the government's property. *Members of City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2134 n.31.

of the twenty-four months during which TURN does not have access.

5. Promotion of fair and efficient rates

The PUC's final asserted justification for its order is that it promotes fair and efficient rates. PUC's M.D. 18. The PUC's order simply has nothing to do with rates. PGandE's rates are not affected at all by the PUC's order.[21]

[21] The PUC also argues that its extensive regulation of PGandE justifies its order. PUC's M.D. 9-14. This argument was squarely rejected by the Court in *Con Edison* v. *PSC*, 447 U.S. at 533-34 and n.1.

CONCLUSION

The judgment of the Supreme Court of California violates PGandE's freedom of speech; it should be reversed.

Dated: New York, New York
May 30, 1985

Respectfully submitted,

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In The

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, TOWARD UTILITY RATE NORMALIZATION, CONSUMERS UNION, CONSUMER FEDERATION OF CALIFORNIA, COMMON CAUSE OF CALIFORNIA, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,

Appellees.

On Appeal From The Supreme Court Of California

BRIEF OF NATIONAL FUEL GAS DISTRIBUTION CORPORATION, THE BROOKLYN UNION GAS COMPANY, CENTRAL HUDSON GAS & ELECTRIC CORPORATION, AND ROCHESTER GAS AND ELECTRIC CORPORATION, AS *AMICI CURIAE*

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QUESTION PRESENTED

Do decisions of a state public utilities commission, which compel a privately-owned public utility to carry in its billing envelopes the messages of a third party, violate the First Amendment to the United States Constitution?

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No. 84-1044

In The

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, TOWARD UTILITY RATE NORMALIZATION, CONSUMERS UNION, CONSUMER FEDERATION OF CALIFORNIA, COMMON CAUSE OF CALIFORNIA, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,

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ple that, under the First Amendment, it is not the function of government to provide TURN the wherewithal to express its views. *See Rochester Gas & Electric Corp. v. Public Service Comm'n,* 51 N.Y.2d 823, 825 (1980), *appeal dismissed,* 450 U.S. 961 (1981). Moreover, the Commission's notion that the Constitution permits it to impair PGandE's rights to the use and control of its billing envelopes in order to enhance expression by an organization such as TURN is at odds with *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976), wherein the Court expressly rejected the government's attempt to "restrict the speech of some elements of our society in order to enhance the relative voice of others," and concluded that such an attempt is "wholly foreign to the First Amendment."[15]

[15] The State's appropriation of PGandE's billing envelopes for the aggrandizement of TURN, a private entity, also amounts to a taking of PGandE's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. As stated in *Thompson v. Consolidated Gas Utilities Corp.,* 300 U.S. 55, 80 (1937), "this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." That principle remains good law. *See Hawaii Housing Authority v. Midkiff,* 467 U.S. ____, 104 S.Ct. 2321 (1984). The taking issue was raised by National Fuel, *et al.,* as well as the other utilities, in *Consolidated Edison Co. v. Public Service Comm'n,* ____ Misc.2d ____ (Sup. Ct. Albany Co. April 10, 1985, Index No. 10762-84). Having decided in the utilities' favor on First Amendment grounds, the New York Supreme Court found it unnecessary to reach the taking issue. *See* pp. 2-3, *supra.*

Also, since, as explained at pages 5-9, *supra,* the billing envelope and the space inside it are PGandE's private property, there can be no "subsidy of utility speech"[16] or "misappropriation of an asset which belongs to the ratepayers," as the PUC contends. PUC Mot. to Dismiss 18. If the case were otherwise, then no commercial enterprise that sends bills to its customers would be immune from claims by those customers that they are being forced to "subsidize" the firm's speech and that it has "misappropriated" a customer-owned asset.

[16] The argument that utility speech is "subsidized" by ratepayers is specious. As explained above (pp. 6-7), PGandE's ratepayers pay for gas and electric *service;* they do not thereby acquire an interest in *property* used to render that service. To the extent that PGandE derives any economic benefit from its use of the billing envelope to convey its messages, that benefit derives exclusively from the Company's ownership of the envelope. Because PGandE's *shareholders* pay the cost of producing *Progress* (Juris. Statement 4), and the inclusion of *Progress* in the billing envelopes adds nothing to the postage cost ultimately borne by ratepayers, there is no incremental cost to ratepayers from such inclusion, *i.e.,* ratepayers pay no more for a mailing in which Progress is included than they would for one in which it is not. Under these facts, there can be no subsidy.

Based upon a "subsidy" rationale similar to that espoused by the PUC, the New York PSC sought to impose fifty percent of all mailing costs (including postage, envelopes, processing costs, and the cost of assembling and updating ratepayer mailing lists) on New York utilities whenever their bill inserts contain utility messages on controversial matters of public policy. The Appellate Division of the State Supreme Court, relying principally on Justice Blackmun's dissent in *Consolidated Edison, supra,* 447 U.S. 530, upheld, by a three-to-two majority, the PSC's cost allocation scheme. *Consolidated Edison Co. v. Public Service Comm'n,* 107 A.D.2d 73 (3d Dep't 1985). The case is currently on appeal to the New York Court of Appeals.

The PUC's stated "compelling interests" are nothing but assertions and pretexts. They fail utterly to meet the State's heavy burden of demonstrating an interest sufficiently compelling to override PGandE's First Amendment rights.

B. The PUC Has Failed To Demonstrate That Its Objectives Cannot Be Achieved By Narrower Means.

Even if the Court were to accept as "compelling" the PUC's asserted interests in forcing PGandE to open its billing envelopes to TURN, the Court must find that the Commission has failed to show that those interests could not be achieved by other means which do not infringe PGandE's First Amendment rights. *See Wooley, supra,* 430 U.S. at 716; *Shelton v. Tucker,* 364 U.S. 479, 488 (1960). To the extent the State perceives expanded consumer representation as necessary, it can carry out that objective by providing funding for such representation — either through existing agencies, such as the Commission staff or the Attorney General, or through entirely new agencies.[17] Such alternative means would not infringe PGandE's First Amendment rights.

The fact that TURN can avoid paying any postage costs or that the State of California can avoid providing additional funding for representation of certain groups in PUC proceedings does not justify this envelope access scheme as opposed to a State-funded program. The Court has repeatedly made clear that fundamental constitutional rights are not to be restricted as a result of a state's fiscal condition or policies. *See Boddie v. Connecticut,* 401 U.S. 371 (1971) (state's interest in recouping court costs not sufficient to override fundamental right); *Schneider v. Irvington,* 308 U.S. 147 (1939) (burden on state caused by littering insufficient to uphold ban on distribution of pamphlets). *See also Buckley v. Valeo, supra,* 424 U.S. at 48-49. Thus, the fact that the State desires to achieve a goal by the least *expensive* means possible cannot override the constitutional requirement that, where First Amendment rights are concerned, the goal be accomplished by the least *restrictive* means possible.

[17] The New York State Consumer Protection Board is an example of such an agency. The Board, through its Executive Director, is specifically authorized to "initiate, intervene in, or participate in any proceedings before the [New York] public service commission . . . ." N.Y. Exec. Law § 553(2)(c) (McKinney 1982).

As explained at page 17, *supra,* in light of PGandE's ownership of the billing envelope and the space inside, the State's purported interest in eliminating a "subsidy" or "misappropriation" of a ratepayer-owned asset cannot withstand constitutional analysis. But even if, contrary to common sense and this Court's prior decisions (*see, e.g., Board of Public Utility Comm'rs, supra,* 271 U.S. at 32), there were such a "subsidy" or "misappropriation," it is difficult to see how allowing TURN to use PGandE's billing envelopes can be considered a solution to that problem. The connection is tenuous at best.

The PUC has certainly failed to suggest, much less demonstrate, that it could not achieve its goal through means less drastic than violating the Company's right of free expression by forcing it to carry TURN's messages. *See Wooley, supra,* 430 U.S. at 716. The Commission has utterly ignored this Court's admonition that regulation which affects vital First Amendment freedoms must be drawn with "precision." *Kusper v. Pontikes, supra,* 414 U.S. at 58-59.

C. The PUC Has Not Demonstrated That The Purpose Of Its Restriction Of PGandE's Right Of Free Speech Is Ideologically Neutral.

Assuming, *arguendo,* that the PUC were able to show both a sufficiently compelling interest and that it had adopted the least restrictive means available for fostering that interest, the Commission must still meet the third criterion of the *Wooley* test —

the requirement that the State purpose underlying the restriction be ideologically neutral. 430 U.S. at 717. This the PUC has not done — nor could it.

As a threshold matter, the offense to PGandE's First Amendment rights is not diminished by the fact that the State has not specifically dictated the message to be carried in the Company's billing envelopes. In *Miami Herald, supra,* 418 U.S. 241, the Court struck down a Florida statute affording political candidates equal space to reply to criticism by newspapers on the ground that such a right to reply intruded impermissibly into the newspaper's decisions with regard to the content of the paper. *Id.* at 258. The Court invalidated the law despite the fact that the State of Florida itself did not dictate the content of the replies.

In the instant case, however, the Commission has mandated access for TURN on the basis that it will represent a particular point of view — that of residential ratepayers — on utility matters. Dec. No. 83-12-047, App. to Juris. Statement 4a, 14a, 16a. For example, according to the Commission and TURN itself, TURN's positions in proceedings involving PGandE are characterized, *inter alia,* by "a desire to keep rate of return and evaluation of rate base relatively low." Dec. No. 83-12-047, App. to Juris. Statement 15a. Access by TURN to PGandE's billing envelopes is obviously designed to promote such a position at the expense of PGandE. In this respect, therefore, the PUC's decisions are even more offensive than the Florida statute invalidated in *Miami Herald, supra.*

This Court has regularly struck down government interference with the right of free expression where such action is based upon the identity or interest of the speaker. *See City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 176 (1976) (state cannot require school district to "discriminate between speakers on the basis of their employment or the content of their speech"); *Police Dep't of*

Chicago v. Mosley, 408 U.S. 92 (1972) (statute prohibiting all picketing except for purposes of labor dispute held to be unconstitutional content-based restriction). Moreover, the PUC cannot be permitted to do indirectly (by selecting a speaker with a known point of view) that which it cannot do directly (by requiring PGandE itself to state that point of view). *Speiser v. Randall, supra,* 357 U.S. at 526.

By intentionally fostering the views of TURN in opposition to those of PGandE, the PUC can make no pretense that its decisions are ideologically neutral as to their purpose. Accordingly, its action fails this element of the *Wooley* test as well.

D. The "Time, Place, And Manner" Doctrine Cannot Salvage The PUC's Action.

Because the PUC's decisions granting access to TURN are not ideologically neutral, the Commission may not, as it has attempted to do (PUC Mot. to Dismiss 17), justify its action as a "reasonable time, place, and manner" regulation, as described in *Consolidated Edison, supra,* 447 U.S. at 536. As the Court summarized, "a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Ibid.* Even if the PUC's pretense of content-neutrality were correct, the Commission has ignored two other elements of the doctrine which render it inapposite to the present case.

First, as the above-quoted language in *Consolidated Edison* indicates, the doctrine is a negative one. It restricts, rather than creates, rights of free speech. The decisions relying upon the "time, place and manner" doctrine make clear that it comes into play when speech which would otherwise occur would impinge upon a competing "significant governmental interest." *Id.* at 535. *See also Regan v. Time, Inc.,* 468 U.S. ____, 104 S.Ct. 3262 (1984). Moreover, the fact that such regulation must "leave am-

ple alternative channels for communication" (*Consolidated Edison, supra,* at 535) underscores its restrictive nature. Obviously, the concept of leaving open "alternative channels" only makes sense in the context of *limitation* on a right, not *creation* of a right where none existed.

Second, the Commission ignores the fact that restrictions as to the time, place and manner of speech are dependent upon a substantial governmental interest in the orderliness of speech — *i.e.,* where the public may be significantly imposed upon as a result of the time at which the speech occurs, the location of the speech, or the physical characteristics of the speech. The Court's example of the "roving sound truck that blares at 2 a.m." in a neighborhood (*id.* at 536), epitomizes the purpose of, and limitations on, the "time, place and manner" doctrine. And the cases discussed in *Consolidated Edison* plainly demonstrate the focus of that doctrine on public places. *Id.* at 535-37. Accordingly, the "time, place, and manner" doctrine is inapplicable to the present case.

E. The *PruneYard* Decision Does Not Support The PUC's Action.

In their Motions to Dismiss, the appellees[18] insisted that the Court's decision in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), precludes reliance upon *Wooley* as a basis for finding a violation of PGandE's freedoms of speech and association. PUC Mot. to Dismiss 23-24; TURN, *et al.,* Mot. to Dismiss 20-24.

In *PruneYard,* the owner of a shopping center sought to exclude from the center students who were soliciting signatures for a petition in opposition to a United Nations resolution. The California Supreme Court held that the State Constitution secured

[18] With the exception of the California Association of Utility Shareholders.

the right of the students to conduct that activity on the shopping center premises and that such interpretation of the California Constitution did not infringe the owner's property rights under the United States Constitution. *Robins v. PruneYard Shopping Center,* 23 Cal. 3d 899 (1979). This Court affirmed, concluding, *inter alia,* that the First Amendment free speech rights of the owner had not been impaired in that (a) the shopping center was open to the public and thus there was little likelihood of the students' message being confused with the views of the owner, (b) there was no governmental prescription of the message being displayed and thus no opportunity for governmental discrimination in favor of or against a particular point of view, (c) the owner could expressly disavow the message by posting signs, and (d) the owner was not compelled to affirm a belief in any governmentally-prescribed position or view. *PruneYard, supra,* 447 U.S. at 87-88.

In their insistence that the *PruneYard* analysis overrides the *Wooley* decision, the appellees overlook the fact that the above-mentioned four factors were identified by the Court as bases for *distinguishing* the *PruneYard* facts from those of *Wooley,* not as a generic substitute for the *Wooley* test.[19] As we explained at pages 14-21, *supra,* the PUC's action clearly fails to meet any of the three criteria identified in *Wooley* in order to pass constitutional muster.[20] Nevertheless, we shall comment briefly on the appellees' arguments that *Wooley* is distinguishable on the bases cited in *PruneYard.*

[19] The Court specifically referred to them as "distinguishing factors." 447 U.S. at 87.

[20] *I.e.,* the Commission's action would have to satisfy each of the following criteria: (1) the State's interest must be sufficiently compelling to warrant the action; (2) the State's objective cannot be achieved by narrower means; and (3) the purpose of the restriction must be ideologically neutral. 430 U.S. at 716-17.

The appellees argued that "there is no danger that the views of TURN will be misidentified as those of PG&E" because the PUC has required that "each insert 'clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or [the] Commission.' " TURN, *et al.*, Mot. to Dismiss 21 (*quoting* Dec. No. 83-12-047, App. to Juris. Statement 32a); *see* PUC Mot. to Dismiss 24. The requirement of such a disclaimer does not, of course, assure that it will be effective — particularly since TURN's messages will arrive at the customer's mailbox in an envelope bearing PGandE's name accompanied by a bill from the Company. Aside from that fact, however, the appellees overlook the vast differences between a 21-acre shopping center to which the public is invited (447 U.S. at 77) and PGandE's billing envelopes in which the public has never been invited to include its messages. The *Prune Yard* decision pointed to the public character of the shopping center as minimizing the danger of confusion among views. *Id.* at 87. But underlying the Court's entire opinion is the recognition that it was "dealing with the public or common areas in a large shopping center and not with an individual retail establishment within or without the shopping center or with the property or privacy rights of a homeowner." *Id.* at 95 (White, J., concurring). *See also id.* at 90 (Marshall, J., concurring) (shopping centers are open "to the public at large, effectively replacing the State with respect to such traditional First Amendment forums as streets, sidewalks, and

parks").[21] Thus, the factual distinction between the very public character of a shopping center — which the Court took pains to point out (*id.* at 77-78, 83) — and the private character of PGandE's billing envelopes cannot be lightly ignored.

The appellees also claim that, "as in *Prune Yard,* the state has dictated no specific message, and thus there is 'no danger of governmental discrimination for or against a particular message.' " TURN, *et al.*, Mot. to Dismiss 21 (*quoting Prune Yard, supra,* at 87). *See* PUC Mot. to Dismiss 23. We disposed of the notion that the Commission's action is content-neutral in our discussion at pages 19-21, *supra,* wherein we pointed out that the Commission has selected TURN as the sender of the message with full knowledge that the message will be opposed to PGandE's fundamental interests.[22] Equally important, because TURN had to obtain PUC approval to gain access to PGandE's billing envelopes, and will have to seek renewal of such approval when the initial two-

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[21] The extent to which shopping centers have become an essential part of the daily lives of much of the population and have "replaced" center-city streets, sidewalks and parks as First Amendment forums is detailed in the opinion of the California Supreme Court. *Robins v. Prune Yard Shopping Center, supra,* 23 Cal. 3d at 907-08. In view of the fact that "[t]he retail mall and shopping center serves much the same public functions as Main Street and the public square," Professor Cox read this Court's decision in *Prune Yard,* not as creating a broad new right of third parties to use a privately-owned shopping center for expression, but rather as "accommodating the law of trespass to modern conditions." Cox, *The Supreme Court, 1979 Term: Foreword: Freedom of Expression in the Burger Court,* 94 Harv. L. Rev. 1, 48 (1980).

[22] The fact that these messages attack PGandE directly and specifically is an important factor not present in *Prune Yard* where the speech involved had no specific relationship to the shopping center's or its owner's interests. *See* 447 U.S. at 99-100 (Powell, J., concurring). This same factor also makes the instant case even more compelling than *Wooley,* in that the New Hampshire State motto, while contrary to the views of the Maynards, did not attack them or their religion directly.

year term expires (Dec. No. 83-12-047, App. to Juris. Statement 32a), the Commission's ability to exert influence over the content of TURN's messages is clear. Accordingly, the appellees' suggestion that the PUC's access requirement fits within the facts of *Prune Yard* because it is content-neutral is pure fiction.[23]

The appellees further claim that PGandE, like the shopping center owner in *Prune Yard,* is free to disavow any apparent connection to, or support of, the messages of TURN in its billing envelopes. TURN, *et al.,* Mot. to Dismiss 21; PUC Mot. to Dismiss 23. Since the appellees' claim is stated in the most conclusory terms, we will not belabor the point by speculating as to how PGandE is expected to disavow TURN messages. Although the opinion in *Prune Yard* suggested that the shopping center owner could post signs to indicate his disagreement with the petitioning activity occurring on the premises (447 U.S. at 87), that suggestion must be viewed in the context of the nature of the shopping center, as a place to which the owner had invited the public, and the California Constitution's guarantee of the public's right to engage in the conduct objected to by the owner.[24] The instant case is factually much closer to *Wooley,* in which the Court rejected the suggestion of the dissenting Justices that "appellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live

[23] Furthermore, even if the PUC's access requirement were content-neutral, the holding in *Prune Yard* would not support the Commission's actions. In *Prune Yard,* this Court did not transfer the control of private property to the government; rather, it merely recognized a limited right of access to such property where the owner has invited public use. In fact, Justice Rehnquist noted that the property owner, not the government, was free to adopt reasonable "time, place and manner" restrictions on third-party access. 447 U.S. at 83-84. The PUC's decisions, therefore, extend far beyond the *Prune Yard* holding by transferring control of private property to the PUC and TURN and by denying PGandE the right to decide when and how its property will be used. *See* note 15, *supra.*

[24] *See also* note 21, *supra.*

Free or Die' and that they violently disagree with the connotations of that motto." 430 U.S. at 722 (Rehnquist, J., dissenting). Accordingly, where the property involved is not open to the public and does not fulfill the function of a traditional public forum, there can be little basis for the notion that the ability to disclaim a message — even by expending minimal effort — cures a violation of the right not to speak or to support another's message.[25]

That is particularly so in this case where, unlike in *Wooley* and *Prune Yard,* the speech at issue directly attacks PGandE. It may be one thing to expect a shopping center owner to post a sign disavowing any association with the expression of views on a matter before the United Nations which does not have even the remotest connection with the enterprise. But it is quite another to say that PGandE's rights of self-expression and association can be safeguarded with a similar one-line disavowal where the messages at issue amount to a direct attack on the Company.[26]

In sum, the *Prune Yard* holding is inapplicable to the present facts. The Court's opinion in *Wooley* is controlling and mandates reversal of the decision below.

[25] *See West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943). The Court implicitly rejected Justice Frankfurter's suggestion that the State could compel school children to salute the flag where both the children and their parents were free to disavow the meaning attached to the salute. *Id.* at 664 (Frankfurter, J., dissenting). As Justice Powell aptly noted in his concurring opinion in *Prune Yard,* the opportunity to disavow compelled speech can never restore the " 'right to refrain from speaking at all.' " 447 U.S. at 99 (Powell, J., concurring; citation omitted).

[26] *See Prune Yard, supra,* 447 U.S. at 99-100 (Powell, J., concurring) (noting examples where speech may "virtually compel" response).

CONCLUSION

As the foregoing discussion demonstrates, the State of California's requirement that PGandE open its privately-owned billing envelopes to TURN strikes at the very heart of the Company's right, under the First Amendment, to use its property to communicate with customers and to refrain from using that property to convey and become associated with messages which it finds offensive and contrary to its own views.

The decision of the California Supreme Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA, *et al.*,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANT

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On Appeal from the Supreme Court of California

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANT

This brief *amicus curiae* in support of appellant is submitted with the consent of counsel to all parties.

INTEREST OF AMICUS

Mid-America has an interest in the disposition of this case which is before this Court on appeal from the judgment of the Supreme Court of California denying appellant's Writ of

Review of the decision of the California Public Utilities Commission (the *"Commission"*) in *TURN v. PG&E,* Decision No. 83-12-047, slip op. (Cal. PUC Dec. 20, 1983), as modified on May 2, 1984, *TURN V. PG&E* Decision No. 84-04-039, slip op. (Cal. PUC May 2, 1984). Mid-America was organized to support the public interest in preserving the economic and social freedoms of our democratic society.

The case now before this Court involves important constitutional issues addressing the basic right of Pacific Gas and Electric Company (*"PG&E"*) to control the use of property for communication and the extent to which this right may be taken by a state regulatory body and transferred to a third party. The significance of the decision of the California Public Utilities Commission and the denial of judicial review by the Supreme Court of California transcend the arena of utility regulation and have ramifications affecting constitutional rights generally.

Amicus presents an analysis with relevant authority of how the award to a ratepayer group of access to "extra" space in the billing envelope constitutes an unlawful taking without just compensation of PG&E's right to control the use of this property in violation of the Fifth Amendment of the United States Constitution as made applicable to the States through the Fourteenth Amendment as well as an infringement of PG&E's First Amendment rights in the use and control of such property. *Amicus* will not address herein the First Amendment arguments presented by PG&E. Instead, *amicus* will address the *ipse dixit* assertion by the Commission that the "extra" space in a billing envelope is not the property of PG&E. That novel assertion would overturn the distinction between governmental regulation and governmental taking of property and reject the constitutional requirement of just compensation for the taking of private property.

SUMMARY OF ARGUMENT

State regulation of public utilities has been recognized for over one hundred years. State regulation, however, is not tantamount to state ownership of a utility. Most public utilities are privately owned and, as such, possess constitutional rights. One of these rights is the Fifth Amendment right to own and use property made applicable to the states under the Fourteenth Amendment. This Court has ruled that the property of a public utility, although devoted to a public use, remains private property and neither the corpus nor the use of the property may be taken without just compensation.

Under California law, the Commission has the power to do whatever is "necessary and convenient" to "ensure the public adequate service at reasonable rates without discrimination." This broad grant of power to the Commission, however, is not without limits. Historically, the Commission has been limited to regulation which does not impinge upon the utility's right to manage and control its own property. Billing envelopes are the private property of the utility. The utility thus has a right to control the use of this property. The Commission's decision to award use of the "extra" space in the envelopes to a third party strips the utility of this right and is therefore an unconstitutional taking in violation of the utility's Fifth Amendment rights as well as an infringement of its First Amendment rights.

ARGUMENT

I. The Power to Regulate Does Not Include the Power to Take Property Without Just Compensation.

State regulation of utilities has been held a valid exercise of police power since the recognition of utilities as natural monopolies. *Munn v. Illinois,* 94 U.S. 113, 126 (1876). Regulation, however, does not amount to ownership. Although there may be a trade-off of monopoly power for greater regulation, public utilities may still be privately owned. *United Railways & Electric Co. of Baltimore v. West,* 280 U.S. 234, 249 (1930). As private entities, public utilities do enjoy constitutional rights. *Santa Clara County v. Southern Pacific Railroad,* 118 U.S. 394, 596 (1886).

Although the California legislature delegates to the Commission the broad power to do all things necessary and convenient to regulate utilities, regulation of a public utility is not the same as ownership of public utility property. This Court made the distinction in *Southwestern Bell Telephone Co. v. Public Service Commission,* 262 U.S. 276, 289 (1923):

> It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and *is not clothed with the general power of management incident to ownership* (emphasis supplied).

The California Supreme Court has also distinguished regulatory power from rights of ownership. In *Pacific Telephone & Telegraph Co. v. Public Utility Commission,* 34 Cal.2d 822, 828, 215 P.2d 441, 445 (1950), the court stated:

> [I]t may not be amiss to point out that the devotion to public use by a person or corporation of property held by them in ownership does not destroy their ownership, and does not vest title to the property in the public. . . .

Since regulation of a public utility is distinct from ownership of its property, any exercise of regulatory power to

transfer property rights must pass constitutional muster. The taking clause of the Fifth Amendment is invoked when a state transfers private property rights to another against the owner's will. U.S. CONST. amend V; *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980). The Fifth Amendment requires payment of just compensation when government appropriates private property. This requirement is intended to curb the arbitrary exercise of a state's police power. *See,* Comment, *Access to Public Utility Communications,* 21 San Diego L. Rev. at 391.

Property rights under the Fifth Amendment are expectancies or interests related to a thing. *United States v. Motors Corp.,* 323 U.S. 373 (1945). These rights include the right to use property, *United States v. Causby,* 328 U.S. 256 (1946); to sell property, *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922); and to exclude others from property, *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). Therefore, the Commission is limited to regulation which does not impinge upon a private entity's right to use or manage its property as it wishes.

The reasons for maintaining private ownership and management of utility property are compelling. As one author states, "[i]t is not hard to show that utility regulation recognizes, and indeed depends upon, private ownership and management . . . . If the state legislatures had wished to own and manage utilities they could have done so." Comment, *"Management Invaded"—A Real or False Defense?,* 5 Stan. L. Rev. 110, 126 (1952).

II. The Decision of the Public Utilities Commission to Allow a Third Party Access to the Billing Envelope Violates the Constitutional Rights of Pacific Gas and Electric Company.

The Commission has determined that the extra space in the billing envelope is property of the ratepayers and not PG&E.

Appendix to Jurisdictional Statement ("app.") p. 26. In prior decisions in which the Commission attempted to articulate the ratepayers' interest. however, it expressly distinguished their right from a traditional property right. *Id* at 3-4.

The Commission first addressed the issue of who owns the extra space in 1981 when it ruled on TURN's claim that PG&E had violated advertising standards set out in the Public Utility Regulatory Policies Act of 1978. In this decision, the Commission said that the economic value of the extra space in the envelope belongs to the ratepayers because they create the space by paying for the envelope and postage. It said further that use of the space for the Progress instead of some other purposes deprives the ratepayers of that "value" which they own (Decision No. 93887, app. p. 67).

The Commission subsequently tried to clarify the nature of the ratepayers' interest in *Center for Public Interest Law v. San Diego Gas & Electric Co.,* (Decision No. 83-04-020, app. p. 90). The Commission said that although the extra space belongs to the ratepayer, it was not describing a traditional property right, but an equity right. In defining this equity right, the Commission said that not everything paid for with ratepayer money is the sole property of the ratepayer. However, the ratepayers derive their interest in the extra space because they pay for the conveyance of their bills and occasional legally mandated notices, which are costs necessary to the operation of the utility app. p. 100). The Commission also believed that equity requires that the extra space be used in the manner most beneficial to the ratepayers who have paid for it (app. p. 101).

In its most recent ruling (Decision No. 83-12-047 as modified by Decision No. 84-05-039), the Commission, although discussing the evolution of this right in prior decisions, clearly defined the ratepayer's interest as a traditional property right. "The very central point PG&E ignores here is that the extra space is *not* 'property held by [PG&E] in ownership. It is an artifact which the ratepayers have paid for and which is

extraneous to the provision of a bill.' " (app. p. 26). The Commission made no attempt whatever to distinguish billing envelopes or the "extra" space therein from any other property included in PG&E's rate base.

The Commission's ruling that the "extra" envelope space is "the property of PG&E's ratepayers" and that therefore PG&E's "taking" arguments have no merit (app. p. 27) is clearly erroneous. Although PG&E is a public utility, it is privately owned and consequently has a right to determine the use of its *own* property:

> [T]he property of a public utility, although devoted to the public service and impressed with a public interest, is still private property; and *neither the corpus of that property nor the use thereof* constitutionally can be taken for a compulsory price which falls below the measure. One is confiscation no less than the other.

United Railways and Electric Company of Baltimore v. West, 280 U.S. 234, 249 (1929) (emphasis supplied).

The ratepayers of PG&E are paying for the *service* rendered to them, not for the property used to render it. "By paying bills for the service, they do not acquire any interest, legal or equitable, in the property used for their convenience. . . . Property paid for out of monies received for a service belong to the company, just as does that purchased out of the proceeds of its bonds and stock." *Board of Public Utility Commissioners v. New York Telephone Co.,* 271 U.S. 23, 32 (1926). These principles were enunciated by this Court over fifty years ago and remain good law. In *Consolidated Edison Company v. Public Service Commission,* 447 U.S. 530 (1979), the central issue was whether a Commission ban on billing inserts by the company dealing with controversial issues of public policy violated the corporation's First Amendment right of free speech. In holding the ban unconstitutional, this Court assumed that the billing envelopes were Consolidated Edison's private property. The court stated that the utility "seeks merely

to utilize *its own billing envelopes* to promulgate its views on controversial issues of public policy." 447 U.S. at 541 (emphasis supplied).

As noted above, the fact that the ratepayers pay for the envelopes and postage used in PG&E's monthly bills is insufficient to give them property rights to the extra envelope space. Under this rationale, any unused or "underutilized" property of the utility such as land, vacant offices or conference rooms and unused storage space might be considered to be available for ratepayer use.

> Property rights are acquired through the creation, purchase or possession of a thing. Under the common meaning of the words, ratepayers are neither creators nor possessors of the utility's billing envelopes. *The Commission's decision is more simply understood as based on the premise that the utility has no rights to the extra envelope space.*

Comment, *Access to Public Utility Communications: Limits Under the Fifth and First Amendments,* 21 San Diego L. Rev. 391, 397 (1984) (emphasis supplied).

The Commission's ruling is a "taking" for it has taken the private property of PG&E and given it to a third party who would never have had any rights to it without this decision. This is a clear violation of the Fifth Amendment which prohibits the taking of private property for a public use without just compensation and which can be applied to state action through the Fourteenth Amendment. *Chicago, Burlington and Quincy R.R. Co. v. Chicago,* 166 U.S. 226, 236 (1897).

Property rights include the right to use property, *United States v. Causby,* 388 U.S. 256 (1946); to sell property, *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922); and to exclude others from the property, *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). Although the Commission action may be considered to be a "limited" taking, i.e. PG&E still retains space for its newsletter, this does not remove it from the sphere

of Fifth Amendment rights. In *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), this Court dealt with the issue of whether the involuntary installation of cable television facilities on appellant's roof constituted a "taking" of her property. Although acknowledging that the cables constituted an interference with only a portion of appellant's property, this Court ruled that it nevertheless constituted a taking compensable under the Fifth Amendment. "[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." 458 U.S. at 436-7.

Appellees may argue that the *Loretto* case does not apply because it involved an exclusive permanent taking whereas the instant case involves only a temporary limitation on the right to exclude, since TURN is given access to the billing envelopes only four times a year for two years. Under *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), and *Kaiser Aetna,* 444 U.S. 164, such temporary limitations are subject to a more complex balancing test to determine whether they are a taking. *Loretto,* 458 U.S. at 435 n.12. The 1984 Commission decision, however, did not restrict access to the billing envelopes to TURN only.

> Our action today should not be viewed as restricting access to TURN. The adoption of this proposal in no way precludes other proposals from being considered. Should other proposals be brought before us, we will consider the feasibility and benefits of each at that time. *If we find that these proposals are meritorious, we could order that extra space be made available for the new program along with any previously authorized ones.*

(app. p. 19) (emphasis supplied). Thus, the Commission decision does have the effect of an exclusive and permanent taking of the extra envelope space. Just as TURN, a self-styled consumer group, received access to PG&E's billing envelopes, so may other consumer groups whose proposals the Commission may find meritorious. The practical problems of such a

system are obvious, but the constitutional problems are no less serious.[1] As this Court stated in the *Loretto* case:

> Property rights in a physical thing have been described as the rights 'to possess, use, and dispose of it.' *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First the owner has no right to possess the occupied space himself and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.

See Kaiser Aetna, 444 U.S. at 179-180; *see also,* Restatement of Property § 7 (1936), *cited in Loretto,* 458 U.S. at 435-6.

For the utility in the instant case, the PUC ruling does mean a loss of control over the use of their property, as well as a serious invasion of management rights.[2] It would be different if

[1] *See Vermont Public Interest Research Group, Inc., et al. v. Central Vermont Public Service Commission,* 39 PUR 4th 59 (1980), where the Vermont Public Service Commission denied the petition of seven public interest groups to have access to billing envelopes to reply to the utility's pronuclear power inserts. "Not only would a right of access policy in respect of the utility billing process inevitably curtail the very freedoms that petitioners assert would be enhanced, the administration of a right of access policy would be simply impractical. Parceling out the right to use the utility bill among every would-be-pamphleteer and politician would be, as a practical matter, impossible, subjecting the board to charges of favoritism and exposing it to endless litigation." 39 PUR 4th at 72.

[2] Regulatory power is limited to the area of direct consumer utility contact. The purpose of regulation is to ensure adequate service to the public. Therefore, a commission has extensive control over what services are to be provided for the public. On the other hand, *how* these services are to be provided is not so clearly within the grant of power. Invasion of management therefore "means that a regulatory body has attempted to order 'how' a service or facility is to be provided." Comment, *"Management Invaded"—A Real or False Defense?* 5 Stan. L. Rev. 110, 120-121 (1952).

the commission had ruled that PG&E should use this space for the benefit of the ratepayers, leaving it up to the utility how to implement such an order. In fact, this appeared to be what PUC contemplated in its 1981 ruling that the envelope space was "ratepayer property," (app. p. 72). At that time, PG&E could not anticipate that the PUC would parcel out this property to various third parties. What PUC has done in its 1984 ruling is appropriate the *control and allocation* of this property away from the utility and, as pointed out above, the loss of the right to exclude third parties from the use of one's property is a "taking."

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of California denying a Writ of Review of the decision of the Commission should be reversed and remanded for further proceedings consistent with the rights of PG&E under the Fifth and Fourteenth as well as the First Amendment rights of PG&E.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*

This Court has noted probable jurisdiction over Appellant Pacific Gas and Electric Company's ("PGandE") appeal which seeks to overturn California Public Utilities Commission ("CalPUC") Decision No. 83-12-047, as modified by Decision No. 84-05-039 (collectively, "Decisions"). See Appendix to Jurisdictional Statement ("App.") A & B, A-1 through A-61. The Decisions require PGandE to give to TURN, a private association purportedly representing the interests of PGandE's residential customers, free access to "extra space" within

PGandE's billing envelopes. Unfortunately, no court has heretofore reviewed the Decisions, for in early October 1984, the Supreme Court of the State of California denied PGandE's petition for a writ of review.[1] Because of the importance of the questions involved in the PGandE appeal, Pacific Northwest Bell Telephone Company ("PNB"), Pacific Power & Light Company ("Pacific Power"), and Oregon Independent Telephone Association ("OITA"), through their counsel, requested and received consent from all parties to the proceedings below to submit this brief.

Amicus PNB is a Washington corporation providing telephone service to local exchange customers located in Oregon, Washington, and Idaho. Over 700,000 of its customers are located in Oregon. On November 6, 1984, the Oregon electorate enacted an initiative measure, popularly referred to as Ballot Measure 3. The text of Ballot Measure 3 is reprinted in App. J at A-142 through A-150. In essence, Ballot Measure 3 creates an "independent, nonprofit public corporation" known as the "Citizens' Utility Board" ("CUB"),[2] and requires, *inter alia*, that Oregon investor-owned utilities such as PNB allow the CUB to insert its material in such utilities' billing envelopes up to six times per year, all at no cost to the CUB (even if such imposes substantial costs on the utility) so long as the weight of the CUB material does not exceed .4 ounce. Ballot Measure 3 at Sections 10-11, App. J at A-147 and A-148. In addition, Ballot Measure 3 effectively prevents utility customers from obtaining the benefits of technological improvements to the present billing process; Section 12(2), App. J at A-149,

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[1] While a number of states have imposed similar requirements upon regulated utilities, the only other judicial challenge involving the access-to-billing-envelopes concept occurred in New York. On January 4, 1985, the New York Supreme Court, Albany County, issued an order invalidating such a requirement on First Amendment grounds. *Consolidated Edison Co. of New York v. Pub. Serv. Comm'n of New York*, ____ N.Y.S. 2d ____ (slip opinion).

[2] Although Ballot Measure 3 asserts that CUB will be a "nonprofit public corporation funded by voluntary contributions," App. J at A-142, the Oregon Attorney General's participation in this proceeding strongly suggests that all CUB actions (unlike TURN actions) are in fact actions of the State, and accordingly that the CUB must operate under federal constitutional limitations.

prohibits changes to present billing processes if such would hinder the CUB's ability to distribute material. Finally, Sections 12 and 17 of Ballot Measure 3 make "discourag[ing] the distribution of [CUB] material" a Class A misdemeanor, App. J at A-149 and A-150, which under Oregon law is punishable by up to a year's imprisonment and a fine of up to $5000. Or. Rev. Stat §§ 161.635, 161.655. While it is likely that the CUB will use the space in the utilities' billing envelopes in a manner hostile to the utilities' interests, Ballot Measure 3 imposes virtually no restrictions upon the use the CUB can make of the .4 ounce.

Amicus Pacific Power is an assumed business name for the electric operations portion of PacifiCorp, a Maine corporation. Pacific Power provides retail electric service in California, and accordingly is regulated by Appellee CalPUC. Therefore, the precedent established in this proceeding may directly affect Pacific Power's California electric operations. Pacific Power also provides retail electric service to customers located in Oregon, Washington, Idaho, Montana, and Wyoming. Because of its Oregon electric operations, Pacific Power, like PNB, is subject to the provisions of Oregon's Ballot Measure 3.

Amicus OITA is an Oregon nonprofit association composed of independent investor-owned and cooperative telephone utilities. Most OITA members are subject to Oregon's Ballot Measure 3.

A decision from this Court invalidating the Decisions would eliminate the California administrative precendent which could otherwise be injurious to *Amicus* Pacific Power's California electric utility operations. In addition, because Oregon's Ballot Measure 3 is at least as constitutionally infirm as the Decisions which are the subject of the instant

appeal,[3] a decision on the merits in favor of Appellant PGandE would likely terminate the controversy surrounding Ballot Measure 3, which controversy directly and immediately affects all *Amici*.

SUMMARY OF ARGUMENT

Notwithstanding comprehensive state economic regulation, public utility companies are no less entitled to constitutional protections than other, nonregulated businesses. Among the constitutional guarantees available to public utility companies are the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. The Decisions violate each of these constitutional guarantees.

The Decisions violate the First Amendment in that (1) they chill protected political speech by utilities, (2) they compel PGandE to disseminate political views antithetical to its own, (3) they engage in content-based regulation of speech, and (4) they require PGandE to subsidize views antithetical to its own. The Decisions violate the Fifth and Fourteenth Amendments because they sanction the taking of PGandE's private property without just compensation.

[3] For example, it appears that the Decisions attempted to treat PGandE and TURN in a similar manner by requiring each to bear the incremental costs of mailing political advertising. *See* App. A at A-32. Ballot Measure 3, on the other hand, patently requires the utility — and most likely the utility's ratepayers — to pay the incremental costs of postage for CUB materials. This is because the Decisions allocate "extra space" only, while Ballot Measure 3 confers upon CUB an *absolute right* to .4 ounce, *i.e.*, regardless of whether the CUB material would increase postage costs. As Justice Blackmun noted in his dissent in *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 551-52 (1980), Oregon law prohibits utility ratepayers from paying the costs of utility political advertising. Thus, because Ballot Measure 3 can be construed to confer an advantage to CUB anti-utility political speech which is denied to the utility's own political speech, Ballot Measure 3 appears to discriminate unconstitutionally against utility speech.

ARGUMENT

In recent months, states have used both the legislative and the administrative process to require private, investor-owned utilities to allow third-party access to the utilities' billing envelopes. Such requirements represent a fundamental shift in the long-established balance between public regulation and private enterprise.

Under traditional notions of public utility regulation, private utility companies are subjected to rate regulation in part to avoid monopoly profits. *See* J. Bonbright, *Principles of Public Utility Rates* Ch. 1 (1961). In that ratemaking process, utilities are allowed an opportunity to earn *up to* a specified rate of return upon capital invested in public utility property.[4] It is important to emphasize that a "reasonable" rate is usually intended to be the *maximum* a utility can receive; as the recent financial difficulties encountered by some electric utility companies attest, this opportunity is not to be confused with any guarantee of profitability. If the utility is unable to earn the return authorized by the regulators, it is the utility shareholder, as opposed to the utility customer, who suffers. The same fundamental principle applies to utility expenses — the utility is allowed to recover only those expenses which the regulators find, usually after the fact, to have been prudently incurred. Thus, again, in return for the opportunity to recover up to 100 percent of its costs, the utility bears the risk of justifying that its expenses meet the prudence criterion.

From the foregoing, it is clear that, notwithstanding comprehensive state regulation of public utility companies, such companies retain their private status. As this Court noted as early 1923, the State "is not the owner of property of public utility companies and is not clothed with the general power of management incident to ownership." *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 289. That utility customers have paid their utility bills does not mean that private property owned by the utility company has become its customers' property. *Board of Public Utility*

[4] CalPUC's Motion to Dismiss asserts that public utilities under California law are given "an assurance of an *opportunity* to earn a reasonable rate of return . . . ." CalPUC Motion to Dismiss at 22 (emphasis added).

Commissioners v. New York Telephone Co., 271 U.S. 23, 32 (1926). The Decisions, however, seem to assume that the state regulatory structure implies utilities' loss of constitutional protections traditionally afforded non-regulated businesses. It is this assumption which constitutes a fundamental departure from traditional norms of public utility regulation — a departure which violates the First, Fifth and Fourteenth Amendments to the United States Constitution.

I. THE DECISIONS VIOLATE THE FIRST AMENDMENT

The First Amendment, made applicable to the States through the Fourteenth Amendment, *Gitlow v. New York*, 268 U.S. 652 (1925), provides: "Congress shall make no law ... abridging the freedom of speech . . . ." The First Amendment protects both an individual's speech and corporate speech. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

A. The Decisions Must Be Overruled Because They Are Based upon a Fundamental Misinterpretation of Federal Law, Which Misinterpretation Chills Utility Speech.

From the outset, the Decisions have been infected by a fundamental misinterpretation of federal law. Specifically, the Decisions are based upon an erroneous interpretation of Section 113 (b) (5) of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2623 (b) (5) (1982) ("PURPA"). This misinterpretation has resulted in a dispute of significant constitutional import, and, if allowed to continue, will dramatically chill utilities' speech. The history of this misinterpretation is set forth below.

Section 113 of PURPA establishes "standards" which state regulatory bodies are to consider adopting. Upon adoption, these standards have the force of law. CalPUC adopted the "political advertising" standard of Section 113 (b) (5) of PURPA. *See* Decision 93887 (December 30, 1981), App. D at A-66. PURPA Section 113 (b) (5) provides:

> No electric utility may recover from any person other than the shareholders (or other owners) of such utility any *direct or indirect expenditure* by such utility for promotional or political advertising as defined in section 115(h).

Emphasis added. The critical phrase is italicized — "direct or indirect expenditure." The plain, dictionary meaning of "expenditure" is "The act or process of expending; outlay." *American Heritage Dictionary of the English Language* 462 (1980). Thus, PURPA Section 113 (b) (5), once adopted by a state, prohibits the utility's recovery from utility customers amounts the utility actually paid out for political advertising. The legislative history behind PURPA bears out this plain meaning; the conference report on Section 113 (b) (5) asserts:

> The conferees stress that the standard on advertising prohibits recovery of expenditures for promotional or political advertising from anyone other than the shareholders (or other owners) of the utility, instead of prohibiting recovery from the electric consumers of the utility, as did the House bill. Without this change from the House bill, utilities for which the owners are also the electric consumers, i.e., cooperatives, could be effectively prohibited from undertaking any political or promotional advertising if this standard were adopted. Adoption of the standard does not prohibit any utility from engaging in this kind of advertising. *The standard merely specifies who is to pay for the advertising.*

House Conference Report No. 95-1750 at 77, Pub. L. 95-617 (95th Cong. 2d Sess, 1978), *reprinted in* 6 U.S. Code Cong. & Admin. News 7811 (1978) (emphasis added).

While PURPA Section 113 (b) (5) prohibits *recovery of expenditures*, CalPUC Decision 93887 took that standard a significant step further. CalPUC first reviewed PGandE's *Progress* (a pamphlet intended to provide information to electric consumers; *see* App. N at A-183 *et seq.*), and held that *Progress* constitutes "political advertising" under the definition set forth in PURPA Section 115 (h). App. D at A-66. *Amici* do not contest this determination for purposes of this brief. Also

in Decision 93887, CalPUC concluded that it earlier had adopted PURPA Section 113 (b) (5), which, as noted above, prohibits utilities from recovering political advertising expenditures — outlays — from ratepayers. App. D at A-66. What CalPUC should have done at this point was determine whether, in fact, PGandE had charged its customers for actual outlays associated with *Progress* and, if so, move to allocate such costs, retroactively if necessary, to utility shareholders. CalPUC, however, instead launched into a miasmic search for "value" in the "extra space" of billing envelopes used to carry *Progress*. As CalPUC noted,

> Use of the space for the Progress instead of some other purposes deprives the ratepayers of that "value," which they own. Since PGandE captures that "value" without charge, it is recovering a cost from the ratepayers. We believe such recovery is forbidden under PURPA.

App. D. at A-67. Thus, by equating "extra space" with "value," then bootstrapping this tenuous conclusion into an even more dubious assumption that "value" means "opportunity cost,"[5] which was then stretched to mean "cost," CalPUC was able to convince itself that PGandE had violated PURPA Section 113 (b)(5). In this manner, CalPUC transformed "value" into "opportunity cost" into "cost," and implicitly concluded that the latter term constituted a PURPA Section 113 (b) (5) "expenditure," thus putting PGandE in violation of the PURPA political advertising standard. Once this purported "violation" was found, CalPUC undertook an equally strained search for a remedy; instead of focusing on the remendy Congress obviously intended, *viz.*, shareholder reimbursement of ratepayers, CalPUC in the Decisions conferred a counterbalancing "right of access" to PGand E's "extra space" upon TURN.

Why is this chronology and analysis critically important? Because, as demonstrated above, CalPUC in the Decisions established a rationale based upon an erroneous interpretation of PURPA Section 113(b) (5),

[5] CalPUC was candid enough to admit that the "cost" referred to in the above quotation was not the typical dollars-and-cents type of cost, but rather an "opportunity cost." *See* Decision 98837, App. D at A-68 and A-69.

which rationale, if allowed to stand, will chill utilities' First Amendment right to freedom of speech just as effectively as the New York Public Service Commission's blanket prohibition against utility political speech which this Court overturned in *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980).[6] This is because it is a rare utility indeed which would dare to express *any* opinion on *any* controversial issue at all in a bill insert using "extra space" — a practice this Court expressly found subject to First Amendment guarantees in *Consolidated Edison* — if the likely response was a state-mandated requirement that the utility give free billing-envelope access to political views hostile to its own.

The potential deterrent effect CalPUC's misinterpretation of PURPA Section 113 (b) (5) can have upon utilities' right to freedom of speech is itself a compelling reason for voiding the Decisions. As this Court stated in *NAACP v. Button*, 371 U.S. 415, 433 (1963):

> [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.

And when, as in the present case, the sanction is compelled service to hostile political views, deterrence is virtually assured. In sum, the Decisions must be ruled unconstitutional for these reasons alone.

Even *if* the Decisions had been based upon a proper reading of PURPA and *if* no chilling effect upon other utilities' speech would result from the Decisions, this Court should find them unconstitutional infringements upon PGandE's First Amendment rights. The several, independent bases for such a finding are set forth below.

[6] This Court noted:

> Consolidate Edison's status as a privately owned but government regulated monopoly [does not] preclude its assertion of First Amendment rights. . . . We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. . . . Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters.

447 U.S. at 534 n.1.

B. The Decisions Violate the First Amendment by Compelling PGandE to Disseminate Political Views Hostile to PGandE's Interest.

The First Amendment not only safeguards the right to speech, it also protects one's choice *not* to speak. Thus, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court invalidated a Florida requirement that a newspaper publish a political message submitted by a third party. Even more directly on point, in *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court declared unconstitutional a New Hampshire requirement that passenger vehicles licensed in the state bear plates with the motto, "Live Free or Die." Appellee Maynard challenged this requirement by placing opaque tape over the motto. In determing that the appellee Maynard could not be compelled to advertise material he found "politically abhorrent," 430 U.S. at 713, this Court began with the

> proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. *The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."*

430 U.S. at 714 (emphasis added, citations omitted). The Court noted that *because* the motto was a popular expression of political sentiment in the State, there was a heightened need for constitutional protections. 430 U.S. at 715. Accordingly, upon determing that First Amendment principles were implicated, the consequent question became whether the State had a compelling interest in requiring display of the political motto.

New Hampshire proposed two justifications for requiring motorists to display the motto. First, the State argued that because the motto was printed only on passenger vehicle plates, it facilitated law enforcement authorities' identification of properly licensed vehicles. 430 U.S. at 716. Second, the State admitted seeking to communicate its official view of proper ideology. This Court disposed of the first claim by noting that identification of properly licensed vehicles could easily be accomplished by means not intrusive upon appellee Maynard's right not to associate himself with the motto. In disposing of the second State justification, the Court noted,

> [W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

430 U.S. at 717 (footnote omitted). Finally, in a footnote, the Court distinguished its holding voiding the required display of the State's motto on license plates from the question of whether the national motto "In God We Trust" would also be declared unconstitutional by noting that, because of the very nature of currency, its bearer is "not required to publicly advertise the national motto." 430 U.S. at 717 n.15.

Application of the *Wooley* criteria makes it manifest that the Decisions cannot withstand scrutiny under the First Amendment. Access to PGandE's billing envelopes is granted not only to facilitate dissemination of political views antithetical to PGandE's, but also to *urge action* upon those views. Unlike the motorist Maynard, those who receive TURN's views are solicited to political activity *intended* to be hostile to the courier's — PGandE's — interest. Thus, if First Amendment implications were raised in *Wooley* by merely requiring display of political views, *i.e.*, in the absense of incitement to political action, such intended incitement as in this case raises even more fundamental First Amendment concerns.

As noted above, once First Amendment principles are implicated, the analysis shifts to the question of whether there is a compelling state interest; this, in turn, raises the question of what State interest the CalPUC is seeking to serve by the Decisions. Starting at the most basic level, the Decisions merely provide an economic and political subsidy to a private political-action group, TURN. For example, TURN will not have to bear the costs all other, non-favored interest groups have to bear in reaching potential members. In addition, TURN

will automatically gain access to PGandE's customer lists — items normally thought to be of both political and economic value.[7] At the most ethereal level, the Decisions might be thought to advance the nebulous ideology of "consumerism." Nowhere along this scale of possible interests can even a close-to-compelling State interest be found. For example, TURN can easily solicit members just as all other political-action groups do — through its *own* mailing program, and at its own cost. Certainly envelopes are not in scarce supply, and utility customers could be reached through mass mailings to every household. Turning to less intrusive means, the State of California could subsidize TURN and still avoid most First Amendment implications by appropriating taxpayer funds to defray costs of an independent TURN mailing. *See* 430 U.S. at 721 (Rehnquist, J., dissenting). Furthermore, attention should also be focused upon the means the Decisions employ to secure compliance: As in *Wooley*, severe sanctions may follow PGandE's refusal to display or disseminate material. In California, the penalty for violation of a CalPUC order is a fine of up to $1,000 or imprisonment for one year, or both. Cal. Pub. Util. Code § 2110 (West) (1975). Finally, addressing the Court's comments distinguishing license plates from currency, the sole reason that utility bill inserts are sought by political-action groups is *because* utility bills demand attention; unlike currency, which is "generally carried in a purse or pocket and need not be displayed to the public," 430 U.S. at 717 n.15, utility billing materials are designed to — and do — communicate specific information important to the recipient. *See* CalPUC Motion to Dismiss at 20.

In sum and in substance, the Decisions constitute an unconstitutional infringement upon PGandE's right to refrain from speaking by compelling PGandE to disseminate views hostile to its own. *Wooley* alone is a compelling basis for invalidation of the Decisions. A second, closely related ground for invalidation also exists — that the Decisions unconstitutionally engage in content-based regulation of speech.

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[7] CalPUC itself admits the value of these lists by noting that consumer organizations generally do not "have a way of reaching that 'captive' audience in a manner which demands its special attention to [the consumer organization's] message." CalPUC Motion to Dismiss at 20.

C. The Decisions Violate the First Amendment by Engaging in Content-Based Regulation of Speech.

In 1980, this Court in *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980), held that state regulatory authorities may not prohibit electric utility companies from using their own billing envelopes to disseminate political messages. To reach this conclusion, the Court first explicitly found that utilities are entitled to freedom of speech. The Court emphasized that the State has no business involving itself with the content of such speech:

> The First and Fourtheenth Amendments remove "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . ."

447 U.S. at 534 (emphasis added), quoting *Cohen v. California*, 403 U.S. 15, 24 (1971). After noting that reasonable time, place and manner restrictions are often upheld, the Court added a critical caveat:

> But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." . . . . Governmental action that regulates speech on the basis of its subject matter ' "slip[s] from the neutrality of time, place, and circumstance into a concern about content." '

447 U.S. at 536 (citations omitted). As is demonstrated below, the Decisions cannot withstand the hard scrutiny mandated by *Consolidated Edison*.

First, the expected content of TURN's political messages is the Decisions' *raison d'etre*; had not TURN appeared willing — indeed, delighted — to take up the political cudgel against PGandE, TURN would not have been the subject of CalPUC's largesse. Thus, the content of speech figures prominently in the Decisions.

The second question the Court addressed in *Consolidated Edison* was whether a content-neutral prohibition of speech could survive the hard scrutiny mandated by the First Amendment. This issue, of course, has no bearing on the present controversy, for the Decisions go further than merely prohibiting speech; in effect, the Decisions compel PGandE to provide favored treatment to TURN's hostile political views. Because there are no subject matter restrictions involved in the controversy,[8] the remaining question becomes whether the Decisions constitute a narrowly tailored exercise of appropriate police powers.

CalPUC may well attempt to justify its forced assistance to TURN by asserting that, because PGandE inserted *Progress* into its billing envelopes, CalPUC thereby became entitled to "balance" the use of *Progress* by the forced insertion of TURN materials. See Motion to Dismiss at 18. There is a fatal flaw in such a justification, *viz.*, that CalPUC certainly had less restrictive means available to it — none of which implicated First Amendment values — to remedy an assumed violation of PURPA.[9] For example, as is pointed out in this brief at 5-6, *supra*, traditional ratemaking notions allow regulators to disallow expenses incurred by utilities, which disallowance

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[8] But see the discussion of the discriminatory impact Oregon's Ballot Measure 3 will have upon ratepayer subsidization of CUB's political speech, *supra* at 4 n.3.

[9] While the states are generally to be afforded discretion is discharging state regulatory functions, when First Amendment values are implicated the question becomes whether the policy objectives of the State could have been accomplished without affecting such values. Thus, in *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court on First Amendment grounds invalidated a State requirement that all teachers disclose affiliations with all organizations. The Court said,

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose.

364 U.S. at 488 (footnotes omitted). It is clear that the end desired by CalPUC — assistance to TURN — can be achieved through a variety of means, none of which affect PGandE's First Amendment rights.

automatically shifts such expenses to shareholders. Thus, for example, the New York Public Service Commission issued an order requiring utility shareholders to pay one-half the total cost of a particular mailing if the mailing contains the utility's political advertising. This order was recently upheld by the Appellate Division. *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 485 App. Div. 3d 73 (1985). In the case of CalPUC, it merely had to wait for the next rate case to disallow all costs related to preparation, insertion and delivery of *Progress*. Or, if CalPUC wished speedier action, it could have instituted on its own motion a complaint proceeding against PGandE for its inclusion of *Progress*. *See* Cal. Pub. Util. Code § 1702 (West)(1975). As it is, CalPUC chose the most intrusive means, a choice which also expressly violates the First Amendment principles established in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), discussed below.

In *Miami Herald*, a Florida newspaper had published material critical of a candidate for statewide office. A state statute granted such a candidate a right to "equal space" to respond, and when the newspaper refused such space, litigation ensued. While lower state courts concluded that the statute was unconstitutional, the Florida Supreme Court reversed, upholding the statute. 418 U.S. at 245-46. This Court, after overcoming questions of finality, reversed the Florida Supreme Court's holding and declared the Florida statute unconstitutional. As in the instant proceeding, the proponents of constitutionality asserted that the statute increased the free flow of information to the public. 418 U.S. at 247-48. As noted by the Court,

> The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

418 U.S. at 251. In response, this Court asserted with a statement which seems tailored to the present controversy:

> However much validity may be found in these arguments, at each point the implementation of a remedy *such as an enforceable right of access* necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.

418 U.S. at 254 (footnotes omitted, emphasis added). Because the Decisions chose the most restrictive means of responding to PGandE's insertion of *Progress* into its own billing envelopes, *i.e.*, by giving an "enforceable right of access" to TURN in express violation of the First Amendment principles enunciated in *Miami Herald*, the Decisions must be invalidated.

D. The Decisions Violate the First Amendment by Requiring PGandE to Subsidize Political Views Antithetical to Its Own.

The Decisions require that PGandE use its own billing envelopes and machinery to disseminate political views of TURN, an entity whose policies are antithetical to PGandE's. Added to the clear economic benefit conferred *gratis* upon TURN is the impact utility billing envelopes carry. In short, PGandE is being compelled by the State to contribute to the advancement of TURN's political views. This compulsion runs counter to this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

In *Abood*, the State of Michigan required every public employee to pay a service fee to a union regardless of union membership. The union used part of that fee to support political activity, to which certain employees objected. Addressing the issue of compelled financial support of political actions, this Court held:

> The fact that appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

431 U.S. at 234-35 (footnote omitted).

To reiterate, it is utility property which is being employed to confer distinct economic benefits upon TURN. As this Court noted in *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23, 32 (1926), utility customers' payment of their utility bills does not transfer ownership of the utility's property to such customers. Moreover, it is clear that just as they are repugnant to PGandE's political views, the political views espoused by TURN simply will not be acceptable to all of PGandE's customers;[10] accordingly, even if it *is* assumed that PGandE's customers as a group somehow are entitled to use PGandE's billing envelopes — an assumption which certainly is not admitted — under *Abood*, the envelopes may not be used to subsidize political views with which *some* customers disagree. For these reasons, the Decisions violate the First Amendment principles established in *Abood*.

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[10] CalPUC's Motion to Dismiss highlights both the reasons behind the sensitive nature of utility's customer lists and how the Decisions appear to circumvent state constitutional norms. Footnote 20 of the Motion to Dismiss states:

> It is doubtful whether PGandE can properly disclose, or be ordered to disclose, to consumer groups the names and addresses of its customers. Cal. Const. art. I, § 1, explicitly guarantees the right of privacy to all California citizens, and only recently, in *People v. Chapman*, 36 Cal.3d 98, 113, 201 Cal.Rptr. 628, 679 P.2d 62 (1984), the California Supreme Court held that a utility customer had a reasonable expectation of privacy in unlisted information concerning his name and address, and that the warrantless disclosure of this information violated the search and seizure provisions of Cal. Const. art. I, § 13. Accordingly, the Commission's decision here appears to be the only reasonable way of providing consumer groups with access to the direct mail forum while accommodating the state constitutional privacy rights of the ratepayers. The state, of course, has a significant, if not compelling, interest, *see Widmar v. Vincent*, 454 U.S. 263, 275-276 and n. 17 (1981), in complying with its own constitution.

II. The Decisions Violate the Fifth and Fourteenth Amendments.

The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897). Because no compensation, just or otherwise, has been offered PGandE for the use of its envelopes, this portion of the brief addresses the first two elements of a Fifth Amendment violation, *viz.*, (1) private property (2) taken for a public use.

Private property is involved. Like nonregulated businesses, PGandE sells its commodities to the public. If PGandE's billing envelopes belonged to a nonregulated business, there would be little doubt that the envelopes constitute private property. A question is raised in this area only because PGandE is a regulated entity. The cost of mailing bills, including the cost of purchasing the envelope, is almost invariably included in the cost of service for ratemaking purposes, just as nonregulated businesses pass along their billing expenses to their customers. Merely because a utility is compensated for the use of its property through a formal ratemaking process, however, does not mean that its property ceases to be private property.

As was pointed out in the introduction of this brief, the principle that utility property is not ratepayer property has been expressly recognized by this Court. *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926). In that case, the Court examined whether certain rates were sufficient to allow the utility to obtain a reasonable return on the property used for public service. The Court noted that the customers pay for the service, not for the property used to render the service:

> By paying bills for service [customers] do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.

271 U.S. at 32. The Court went on to conclude that the property belongs to the utility, whether the property is paid for by issuing stocks and bonds, or through funds received as payment for service. *Id.*

Moreover, this Court's recent decision in *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980), noted that the utility was using "*its own billing envelopes* to promulgate its views on controversial issues of public policy." 447 U.S. at 540 (emphasis added). This statement strongly suggests that a utility billing envelope is perceived to be the utility's private property.[11]

The second element is a "taking." This Court has announced that there is no set formula for determining when a taking has occurred, and that each decision must turn upon a consideration of the circumstances involved. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). However, the Court noted that the character of the government's action would carry particular weight in determining whether a taking had occurred. If there has been a physical invasion of the owner's property, a taking probably has occurred. *Id.*

The Court has long recognized that a governmental taking need not involve a governmental acquisition of title. *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (temporary occupancy of leased building). Interference with the owner's right to use his property is a compensable taking. *Id.* More recently, the Court has noted that the fact that there is only a slight economic impact on the owner, or that only a very small area is occupied, does not preclude a finding that there has been a compensable governmental taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-37 (1982) (cable installation on private building pursuant to state law held to be taking). The Court further stated in *Loretto* that if the government

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[11] Notwithstanding these precedents, CalPUC concluded that, "Since the extra space in PG&E's billing envelopes is not property of PG&E, its taking arguments are not meritorious." App. B at A-52. CalPUC's conclusion can only be termed bizarre. If utility customers have a "right" to "extra space" in utility billing envelopes, they also have at least as great a right to such nonsensitive, nonpolitical "extra spaces" as are found in a utility truck front seat (May CalPUC require PGandE to ferry its customers to and fro whenever PGandE vehicles are not fully occupied?) or to occupy free of charge space in its business buildings which are temporarily empty. In sum, CalPUC's "no property" analysis, even when applied to areas in which no sensitive First Amendment values are at stake, is a radical departure from existing property law.

required the property owner to allow another person to have access to the owner's property, that would add "insult to injury." 458 U.S. at 436. Of course, the insult of *Loretto* did not implicate sensitive First Amendment values.

Stating the same concept another way, this Court has held that the right to exclude others from one's private property is a fundamental element of property rights. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In that case, the Court held that the government can not require an owner to allow free access to the owner's private property, unless the government pays a just compensation to the owner for taking away the owner's right to exclude. *Id.*[12]

Although the Court's "taking" cases focus on governmental interferences with an owner's right in real property, the concepts are equally applicable to governmental interference with personal property. By mandating that PGandE must allow TURN to place its materials in the utility's billing envelope, the State is interfering with the utility's own use of the envelope. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Court found that New York's designation of a landmark was not a taking because it "in nowise impaired the present use" of the defendant's property. 431 U.S. at 135. In contrast, requiring PGandE to relinquish part of its envelope space to TURN definitely impairs the utility's "present use" of its property, therefore raising the claim that the State is taking utility

[12] On the other hand, shortly following *Kaiser Aetna*, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court held that there was not taking when a shopping center owner was prohibited by the state from barring political activities in his shopping center. In reaching this decision, the Court focused upon the owner's investment expectations, and found that others' use of the center for political purposes would not unreasonably impair its use as a shopping center. Of course, in contrast to a shopping center open to the public, a billing envelope is a private medium of communication. Moreover, in *PruneYard*, the Court was careful to note that such public use may *not* contravene any other federal constitutional provision, 447 U.S. at 81, and that the shopping center owner's investment expectations would not be upset by the allowing access. 447 U.S. at 83. Both because of the differing expectation of privacy involved in a shopping center on the one hand and an envelope on the other, and because PGandE's stockholders' expectations *would* be upset by TURN's forced access to PGandE's envelopes, the *PruneYard* decision cannot justify TURN's invasion of PGandE's billing envelopes.

property. Indeed, under the Decisions, the State is not merely going to use PGandE's envelope for its own purposes, it is requiring that PGandE allow a *private* third party to have access to the utility's property.[13] Finally, the Decisions require PGandE to allow free access to the utility's property. Under the reasoning of *Kaiser Aetna, supra*, it could be argued that the State must at least pay the utility just compensation for taking away the utility's right to exclude others from utility property. 444 U.S. at 181. CalPUC has failed to do so, and thereby has violated the Fifth Amendment.

[13] Once again, as was stated in *Loretto, supra*, such a governmental action adds "insult to injury." 458 U.S. at 435-36.

CONCLUSION

CalPUC's 1981 error in construing PURPA Section 113(b) (5) led directly to the Decisions; without that misinterpretation of the meaning of "expenditure," it is unlikely that this controversy would have arisen at all. As the twig was bent, however, so grew the tree. If allowed to stand, the Decisions will chill other utilities from ever using the "extra space" in their billing envelopes to comment upon controversial issues of public importance. This chilling effect will be every bit as effective as the outright New York prohibition of such utility speech this Court invalidated in *Consolidated Edison*; for this reason alone, the Decisions should be set aside. Strong, additional First Amendment grounds for voiding the Decisions are also present. The Decisions compel PGandE to disseminate political views hostile to its own in violation of *Wooley v. Maynard*, constitute unconstitutional content-based regulation of speech in violation of *Miami Herald Publishing Co. v. Tornillo*, and violate the principles in *Abood v. Detroit Board of Education* by compelling PGandE to subsidize political views with which it disagrees. Finally, the Decisions violate the Fifth Amendment in that they take PGandE's property without just compensation. For all these reasons, this Court should declare the Decisions unconstitutional and therefore void.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES
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PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the
Supreme Court of California

BRIEF OF WISCONSIN STATE TELEPHONE ASSOCIATION AND WISCONSIN BELL, INC. AS *AMICI CURIAE*

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BRIEF OF WISCONSIN STATE TELEPHONE ASSOCIATION AND WISCONSIN BELL, INC. AS *AMICI CURIAE*

Wisconsin State Telephone Association ("WSTA") and Wisconsin Bell, Inc. ("Wisconsin Bell"), with the consent of all parties,[1] file this brief as *amici curiae* urging that the Court reverse the judgment of the Supreme Court of the State of California. This case is of interest to WSTA and Wisconsin Bell because concurrent with the filing of this brief, they have commenced an action in the United States District Court for the Eastern District of Wisconsin seeking declaratory and injunctive relief from the provisions of Wis. Stat. § 199.10 (1983-84).(*See* Appendix.) Section 199.10 is the functional equivalent of the Order entered in Decision No.

[1]The parties' written consents for WSTA and Wisconsin Bell to file this brief as *amici curiae* have been filed with the Clerk of this Court.

83-12-047 (Cal. PUC Dec. 20, 1983) (hereinafter "Decision No. 83-12-047") and affirmed by the California Supreme Court. Some issues presented in WSTA's and Wisconsin Bell's case are similar to those presented in the above-encaptioned appeal from the Order of the California Public Utility Commission (hereinafter "Cal. PUC").

INTEREST OF THE *AMICI CURIAE*

WSTA is a trade association of telephone companies who provide telephone service within the State of Wisconsin. WSTA's members are subject to regulation by the Wisconsin Public Service Commission (hereinafter "Wis. PSC"). Wis. Stat. § 196.02(1) (1983-84). Wisconsin Bell is a member of WSTA and provides, among other things, local telephone service within its authorized service areas in the State of Wisconsin.

Wis. Stat. ch. 199, which establishes a non-profit public body corporation and politic to be known as the "Citizens Utility Board" (hereinafter "CUB"), became effective November 29, 1979.[2] Section 199.10, like Cal. PUC's Decision No. 83-12-047, provides a procedure pursuant to which, not more than two times annually, CUB may insert enclosures informing utility customers of the nature and activities of the corporation and soliciting contributions. Wis. Stat. § 199.10(2)(b). Pursuant to this provision, CUB has submitted printed statements which Wisconsin Bell and other WSTA members have been required to insert in their billing envelopes. CUB's inserts routinely accuse Wisconsin Bell and other Wisconsin utilities of charging excessive rates. (WSTA App. 7a-9a, 11a-13a, 17a.) CUB has even gone so far as to attack the $1.00 access charge mandated by the Federal Communications Commission through the medium of bills being sent to natural *gas* customers. (WSTA App. 22a.) WSTA's members some cases have responded by denying these charges. (WSTA App. 19a, 20a, 26a, 28a.) However, the Wisconsin Public

[2]The Citizens Utility Board Act, ch. 72, 1979 Wis. Laws 457.

Service Commission has discouraged such responses.[3]

CUB's access to utility billing envelopes under § 199.10 imposes substantial economic burdens on Wisconsin Bell and other WSTA members.[4] For example, Wisconsin Bell's April and March, 1985 residential service bills would have been under one ounce in all but 3% of the cases, but for a CUB enclosure which caused 25% of the bills to exceed one ounce. (WSTA App. 4a.) Thus, Wisconsin Bell had no opportunity to speak in response to CUB's insert without incurring the full cost of mailing. Furthermore, Wisconsin Bell incurred actual costs exceeding $45,000 by reason of CUB's insert, as to which the amount of partial reimbursement by CUB under § 199.10(3) is being litigated.[5]

[3]In a letter dated September 14, 1984 to WSTA and its members, including Wisconsin Bell, the Chairman of the Wis. PSC wrote:

> It has come to my attention that there is an increasing trend of enclosing reply brochures with the CUB enclosures. I completely understand your right to freely express your opinions on any subject including CUB. My concern however is two-fold. First, I would strongly urge you not to engage in a battle of innuendo. Customers deserve arguments on the merits, not further sideshows that produce only confusion. Second, customers will undoubtedly be irritated by receiving even more enclosures with their bill. Therefore, while I assume that the purpose of your reply is not intended to undercut the legislative decision to allow CUB to solicit money from your customers, I am afraid that reply enclosures may produce such an unintended result.
>
> I would hope that you reconsider any decision which you have made to enclose reply enclosures for the two reasons I have mentioned. I doubt that any benefits from such reply enclosures will exceed the detriments which they may cause. I would be happy to discuss my concerns further with you if you wish.

[4]According to Wis. Stat. § 199.10(3) (1983-84):

> If the weight of a public utility's periodic customer billing, when combined with the corporation's statements or other enclosures under sub. (1), exceeds one ounce avoir, the corporation shall reimburse the public utility for the proportion of the total postage cost of the billing which is equal to the corporation's proportion of the total weight of the billing.

The effect of this provision for reimbursement on a proportional basis is that CUB is required to pay only a fraction of the actual incremental mailing costs incurred by Wisconsin Bell by virtue of CUB's inserts. *See* WSTA App. 4a. Under Cal. PUC's Decision No. 83-12-047, Wisconsin Bell would have *no* right of reimbursement.

Section 199.10 is highly content-restrictive. It limits CUB speech to specific topics;[6] it requires PSC approval of content;[7] and, it requires CUB to negotiate with utilities with respect to speech content.[8]

WSTA's members, including Wisconsin Bell, therefore have had considerable firsthand experience with the actual operation of including a professional intervenor's inserts in utility bills. WSTA's and Wisconsin Bell's intent in filing this brief *amici curiae* is to draw on that experience to demonstrate the destructive effect on First Amendment rights generally and the chilling effect on a utility's right of free speech in particular which necessarily results from governmentally compelled access to utility bill

[5]Citizens Utility Board v. Wisconsin Bell, Inc., No. 84-CV-4693 (Dane Co., Wis. filed Aug. 13, 1984).

[6]Section 199.10(1)(d) provides:

> An enclosure or statement furnished by the corporation under this section shall be limited to informing the reader of the purpose, nature and activities of the corporation and informing the reader that the utility consumer billed and others in his or her household may contribute money to the corporation directly. The enclosure or statement shall have the character of a circular and may not have the character of a bill, statement of account or personal correspondence.

[7]The relevant provisions of § 199.10 are as follows:

> (1)(e) The corporation may not furnish any enclosure or statement to a public utility under this section unless the enclosure or statement has been approved by the public service commission under sub. (2m).
>
> * * *
>
> (2m) Prior to furnishing a statement or enclosure to a utility under sub. (1), the corporation shall submit the statement or enclosure to the public service commission. The public service commission shall approve the statement or enclosure if it determines that the statement or enclosure is not false or misleading and that the statement or enclosure satisfies the requirements of this section.

[8]"A dispute arising from the operation of this section shall be resolved by negotiations between [CUB] and the public utility if possible . . . ." Wis. Stat. § 199.10(4).

envelopes by professional intervenors.[9]

SUMMARY OF ARGUMENT

Any governmental action which compels one person to publish the speech of another destroys *free* speech by both the intervenor and the publisher by:

1. Inevitably involving the government in content regulation of speech; and
2. Penalizing the publisher's speech.

ARGUMENT

I. GRANTING PROFESSIONAL INTERVENORS ACCESS TO UTILITY ENVELOPES IS NECESSARILY BASED ON CONTENT.

A. The Cal. PUC's Decision to Require Inclusion of TURN Inserts Was In Fact Content Based.

One fundamental principle clearly enunciated by this Court is that speech may not be prohibited " 'merely because public officials disapprove the speaker's views.' " *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 536 (1980) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1952) (Frankfurter, J., concurring in result)).[10] Therefore, governmental action which is to any degree based on the content of speech must be strictly scrutinized to assure that the regulation does not operate to suppress speech with which some governmental official disagrees.

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[9]Testimony by representatives of the Wis. PSC and Wisconsin CUB was relied upon in both the California PUC (A-98) and the New York (A-116) proceedings. However, no Wisconsin utility testified in either proceeding.

[10]*See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Dallas County Hosp. Dist. v. Dallas Ass'n of Community Org. for Reform Now, 459 U.S. 1052 (1982); Metromedia, Inc., v. City of San Diego, 453 U.S. 490 (1981); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981).

Content regulation is particularly dangerous in this context because it allows utility regulators to influence, directly or indirectly, utility speech. When utilities disagree with regulatory decisions, they must be free to criticize them without concern that their right to speech will be withdrawn, wholly or partially. If the First Amendment guarantees anything, it is the right to criticize the government, including utility regulators, and to promote ideas with which governmental officials disagree.

While the Cal. PUC has not been as candid as was the New York Public Service Commission (hereinafter "N.Y. PSC") in *Consolidated Edison*,[11] the record demonstrates that Cal. PUC's action was no more "content neutral" than was the N.Y. PSC's. On the contrary, the record clearly shows that the Cal. PUC perceived that PG&E was promulgating viewpoints through *Progress* which the Cal. PUC viewed as "inefficient", that TURN would publish views seen as "beneficial", and that others whose views were not as "beneficial" should be denied access.

1. Decision No. 83-12-047 is the Cal. PUC's response to an entirely content-based attack on *Progress*, originally mounted by TURN in Decision 93887. (A-65.)

2. In Decision No. 93887 (Cal. PUC Dec. 30, 1981), the Cal. PUC criticized PG&E for inserting *Progress* in place of "more efficient" uses. (A-68.)

3. Cal. PUC characterized PG&E's use of the envelope as "unjust enrichment" (A-3), a characterization which would not have been made if PG&E were putting the space to its most "efficient" use in the eyes of the Cal. PUC.

4. The Cal. PUC assumed that "ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." (A-17.)

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[11]The N.Y. PSC prohibited utilities from using bill inserts "to discuss political matters, including the desirability of future development of nuclear power." *Consolidated Edison*, 447 U.S. at 532.

5. TURN was granted access to PG&E's envelope because its proposal was seen as sufficiently beneficial to ratepayers. (A-16.)

6. The Cal. PUC refused to allow the Committee of More than One Million California Taxpayers to Save Prop. 13 access to the PG&E billing envelope, on the ground that the content of the Committee's proposed insert did not "sufficiently benefit ratepayers." (A-161.)[12]

B. Further Content Regulation Is Occurring and Will Be Required.

Notwithstanding the Cal. PUC's attempt to preserve the impression that there will be no state intervention in the content of PG&E's and TURN's inserts in PG&E's bills (A-32), further content regulation is inevitable. Indeed, the Cal. PUC's claim of nonintervention is promptly retracted by a regulation that details speech which TURN is required to

[12] In Decision No. 84-10-062, the Cal. PUC stated:

> In determining that the extra space could be used to benefit ratepayers, we did not intend to create a public forum for any group that could claim ratepayers as members. Access to the billing envelopes has so far been granted only to groups organized specifically to represent ratepayers in our proceedings . . . . [W]e do not believe that the Committee's proposal . . . sufficiently benefits ratepayers as ratepayers to justify [access].

(A-160 to 161.) This is the specific "issue" regulation of speech that was held unconstitutional in First Nat'l Bank v. Bellotte, 435 U.S. 765 (1978).

publish as a condition of its access to PG&E's envelopes.[13] The N.Y. PSC has put its finger directly on the problem:

> [T]he Commission is providing [CUB] with the special property of access and, as such, we recognize our responsibility to consider allegations that clearly misleading information is being included in the bill inserts. [A-132.]

The Cal. PUC will inevitably be driven to the same position. The "free space" in utility envelopes is a very limited resource. Once a governmental agency has taken responsibility for maximizing the most "efficient" use of that space, the same logic requires that agency to assure that, in its eyes at least, the use of that limited resource will best benefit the ratepayers.

Thus, content regulation occurs both through the process of selecting the intervenor to be awarded access and later in monitoring the intervenor's speech. Moreover, as earlier demonstrated, the regulator's desire to maintain a balance between the utility's and intervenor's messages leads to suppression of utility speech just as predicted in Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. Rev. 1, 77-80 (1973). Lange foresaw that government mandated access for the purpose of achieving "balance" will inevitably lead to "a new consolidation of American orthodoxy in which balanced mainstream thinking will come to dominate the press even more so than at present while serious dissent will be, in relative terms, even more sure-

[13] TURN shall prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report shall describe TURN's efforts on behalf of residential ratepayers in the past year and include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers.

(A-33). According to the N.Y. PSC's May 14, 1984 Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes, "the CPUC has stated that it would suspend the organization's access to the bill envelope if a serious problem developed." (A-131.)

Wisconsin and Illinois also tightly regulate the content of inserts, requiring *approval* of inserts by the regulatory authority. Wis. Stat. §§ 199.10(1)(e), (2m) (1983-84); Ill. Rev. Stat. ch. 111 2/3, § 909(1)(d) (Supp. 1984).

ly suppressed." *Id.* at 77. In the specific context, if "conservation" or "non-nuclear plants" are the current Cal. PUC policy, there will be strong pressures on both PG&E and TURN to conform to that policy lest their speech be termed "inefficient" and therefore banned or further restricted, as has already happened to PG&E.

C. Content Based Regulation of Access Destroys *Free* Speech.

The First Amendment protects *freedom* of speech; not just speech, but "uninhibited, robust and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). One truly *free* speaker, no matter how biased, is worth more in the eyes of the First Amendment than ten regulated speakers. Multiple points of view are desirable to be sure, but the appearance of multiple speakers, if each speaks only at the sufferance of the government, is an illusion, a pretense of free speech and not the reality thereof. In truth, the Cal. PUC decision, while apparently increasing speech, has actually reduced the number of *free* speakers by at least one (PG&E has clearly lost its freedom), and possibly by two (if TURN conforms its speech to its perception of Cal. PUC orthodoxy).[14]

As noted in 2 Z. Chaffee, *Government & Mass Communications* 701 (1947): "Subsidies are like spectacles. Once you get to depend on them, you cannot live without them." Once TURN or PG&E come to rely upon the Cal. PUC for free access to PG&E's customers, they have *both* lost their *freedom* of speech. Only speech whose content and cost are *totally* independent of the government is truly *free*.

Ideally from the standpoint of the First Amendment, PG&E and TURN would be equally financially capable of expressing their views to PG&E's customers. That ideal world does not exist. The only party which, because of its physical control of the billing envelope, can speak through the PG&E envelope without governmental intervention is PG&E. It is better to have

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[14]Almost as damaging to free speech as the direct governmental regulation discussed above is the supposed cure of informal content dispute resolution between the professional intervenors and the utilities required by Wis. Stat § 199.10(4). *See* note 8 *supra*. The idea of "negotiating" speech with an opponent is absolute anathema to any true believer in free speech.

"unbalanced" but *free* speech, than to have "balanced" speech which can be achieved only at the cost of governmental control of a speech medium.

Use of the "extra space" in utility billing envelopes may be allocated through less intrusive, *i.e.* more content neutral, means such as granting billing envelope access to the high bidder(s). While such alternatives are not desirable either, the means selected by the Cal. PUC — direct governmental choice of a speaker, of the quantity of speech, and of the content of speech — is clearly the *worst* alternative. Even a total ban on speech through utility envelopes, which this Court has already disapproved, would be less of an interference with *free* speech.

II. GOVERNMENTALLY MANDATED ACCESS TO UTILITY ENVELOPES FOR PROFESSIONAL INTERVENORS PENALIZES UTILITY SPEECH.

There are two important lessons for this case in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The first is that governmentally *coerced* access inevitably involves the government in deciding what shall be published and that governmental compulsion "to publish that which '"reason" tells [publishers] should not be published' is unconstitutional." 418 U.S. at 256. The second lesson, which is most directly applicable here, is that authorizing access on the basis of prior publications exacts a *penalty* on the basis of the content of a publication.[15]

There are two aspects to such a penalty. "The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials *and in taking up*

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[15]This observation, while made with respect to newspapers, applies with equal force to utilities' printed messages.

> Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets."

Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (quoting Lovell v. Griffin, 303 U.S. 444, 450, 452 (1938)).

space that could be devoted to other material the [publisher] may have preferred to print.'' Tornillo, 418 U.S. at 256 (emphasis added). The second aspect of the penalty is that, confronted with the first aspect, ''editors might well conclude that the safe course is to avoid controversy.'' *Id.* at 257.

> Therefore, under the operation of the [candidates' right-of-reply] statute, political and electoral coverage would be blunted or reduced. *Government-enforced right of access inescapably ''dampens the vigor and limits the variety of public debate.''*

Id. (quoting *New York Times v. Sullivan,* 376 U.S. 254, 279 (1964)) (emphasis added).

Allowing professional intervenors to have access to utility bills penalizes utility speech in the economic sense by shifting the potential benefit of the use of ''extra space'' in billing envelopes from the utility to the professional intervenors[16] and, in some instances, forcing the utility to subsidize the intervenor.[17] One simply cannot deny that such a shift has occurred through the agency of governmental intervention.

This Court has never allowed the government to shift costs to either burden or benefit speech because of the danger of censorship inherent in making a speaker's costs dependent on governmental favor. In *Grosjean v. American Press Co.,* 297 U.S. 233 (1936), this Court confronted an apparently neutral tax on newspaper publication which the Court recognized was ''bad because, in the light of its history and of its present setting,

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[16]In a recent *gas* utility bill, CUB attacked the $1.00 per month access charge mandated by the Federal Communications Commission and asked for money to lobby Congress to fight the access charge. (WSTA App. 22a.) The net effect of this tactic is that CUB can, without charge, attack telephone utilities through a gas company bill, but the telephone utilities, because of their heavier bills, must incur additional mailing costs if they are to respond. (WSTA App. 4a.) Ironically, then, in this case the process has come full circle so that the supposedly advantaged and disadvantaged parties have, through governmental intervention, exhanged places.

As this shows, equalized speech is exceedingly difficult to achieve. Moreover, the First Amendment mandates *free* speech, not equally effective speech. Buckley v. Valeo, 424 U.S. 1, 49, 54, 56 (1976).

[17]*See* note 4 *supra.*

it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information . . . .'' 297 U.S. at 250. A tax imposed only on the press was ruled unconstitutional in *Minneapolis Star & Tribune Co. v. Commissioner of Revenue,* 460 U.S. 575 (1983), because ''even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for ''[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions.'' 460 U.S. at 588.

The penalty rationale was the point upon which *Tornillo* was distinguished in *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 84 (1980), and which, in turn, is one of the points which distinguishes *PruneYard* from this case. It was clear in *PruneYard* that the speech allowed in the shopping center's public areas was totally independent of, and could have had no possible bearing upon, any exercise of free speech by the merchants or the mall owner. Therefore, the allowance of such speech had *no* effect on the speech of others. Here, it is equally clear that, as in *Tornillo,* TURN was granted access to PG&E's billing envelope precisely because PG&E had exercised its free speech rights through that envelope.

The same point distinguishes *United States Postal Service v. Council of Greenburgh Civil Associations,* 453 U.S. 114 (1981). There is a fundamental difference between the government's uniform denial of access in *Greenburgh* and Cal. PUC's forced access for the very purpose of sponsoring a specific speaker. Denying access to mailboxes to everyone who has not purchased postage is completely independent of content and could not influence content in any manner.

It cannot be disputed that the speech of the utilities is chilled substantially by the penalty of governmentally mandated access to their billing envelopes. Whereas utilities were formerly free to speak to their customers through the billing envelope without concern that their statements would be immediately attacked through the same medium, they now must speak with the knowledge that their own envelopes may be used to contradict what they say. Allowing professional intervenors to make accusations against utilities in the utilities' *own envelopes* creates special burdens on the utilities' speech that use of a different medium would not create.

Accusations of excessive rates, for instance, made in a utility's own envelopes, are unquestionably made in the presence of the utility. Thus, utilities must respond or suffer the clear implication that the accusations are true.[18]

CONCLUSION

This Court should reverse the judgment of the California Supreme Court affirming Cal. PUC's Decision No. 83-12-047.

Respectfully submitted,

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18 "The theory underlying [adoptive] admission [by silence] is that the normal human reaction would be to deny [a statement damaging to a person made in his presence] if untrue." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(2)(B)[01], at 801-201 (1984).

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No. 84-1044

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the
Supreme Court of California

BRIEF OF AMICUS CURIAE WISCONSIN CITIZENS' UTILITY BOARD

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INTEREST OF AMICUS CURIAE

The argument posed by appellant PG&E consistently speculates about the constitutional consequences and pragmatic problems that would supposedly result in the future if ratepayer organizations were periodically allowed to include their messages in the utility's billing envelope. In its Jurisdictional Statement PG&E refers to: 1) hypothetical future messages of intervenor, TURN [Toward Utility Rate Normalization]; 2) the recently passed CUB initiative in Oregon; and 3) proposed enclosure procedures in New York and Nevada. (J.S. p. 10)

Yet PG&E is silent when it comes to discussing the nation's first experience with such enclosures -- that of Wisconsin's Citizens' Utility Board (CUB). In its five year history, Wisconsin's CUB has included 91 enclosures in the periodic customer billings of the 36 utilities which CUB statutorily "watchdogs" on behalf of residential ratepayers.

There are significant historical and structural differences between TURN and a Citizens' Utility Board such as Wisconsin's CUB -- differences which understandably and properly reflect the right of each state to address the interests of economically captive utility ratepayers with a mechanism of the state's choice. However, Wisconsin CUB's five year experience with including enclosures in utility bills provides a relevant empirical basis for evaluating and rejecting many of the fundamental legal and logistical concerns raised in this case.

The Specific Structure Of Wisconsin's CUB

Created by the Wisconsin legislature, the Wisconsin Citizens' Utility Board is a non-profit "public body corporate and politic," established pursuant to Chapter 72, 1979 Wisc. Laws 457, effective November 29, 1979. A summary of relevant provisions in the CUB enabling

statute is included as Attachment 1. A summary of CUB's most recent Annual Report is included as Attachment 2.

CUB has been expressly determined by the legislature to have:

> "a statewide interest and not a private or special concern."
> (Wis. Stats. §199.02)

Summary Of The Nature Of The Wisconsin CUB

Although established by the legislature, CUB is not a state agency and receives no tax dollars. CUB is governed by a board of directors whose eligibility requirements, composition, and election procedures are specifically and statutorily determined. In its more than 5 year history, in excess of 118,000 citizens have joined CUB. Membership eligibility standards and dues levels are likewise set forth in the CUB enabling statute, as are specific stringent duties not imposed on traditional citizen organizations. For example, CUB may not support political candidates. It has also been determined that CUB is subject to Wisconsin's Open Records Law and its Open Meetings Law.[1]

CUB's state-granted right to periodically include enclosures in the utility bill is the fulcrum of its **statutory responsibilities:**

* to represent and protect residential ratepayers
* to inform them of utility service costs and
* to inform them of the procedures for becoming CUB members

---

1. In response to CUB's March 9, 1984 inquiry, Attorney General Bronson C. LaFollette issued an informal opinion on April 12, 1984 in which he concluded that CUB is subject to the Wisconsin Open Records Law [Wis. Stats. §19.32 - 19.37]; and is subject to the Wisconsin Open Meeting Law [Wis. Stats. §19.81 - 19.98].

SUMMARY OF ARGUMENT

"EVERYONE IS IN FAVOUR OF FREE SPEECH. HARDLY A DAY PASSES WITHOUT IT BEING EXTOLLED. BUT SOME PEOPLE'S IDEA OF IT IS THAT THEY ARE FREE TO SAY WHAT THEY LIKE, BUT IF ANYONE SAYS ANYTHING BACK, THAT IS AN OUTRAGE."

> Winston Churchill,
> Speech before the House of
> Commons, October 13, 1943.

Appellant PG&E and its amici colleagues are outraged. PG&E and its amici contend: 1) that it would be an unconstitutional departure from tradition to suddenly force a public utility to include in the utility envelope messages with which it disagrees and 2) that such a requirement would pose inequitable cost and logistical burdens on the utility.

This brief will address the historical inaccuracy of both conclusions, and in so doing will share with the Court a practical description of Wisconsin's CUB's more than five years of experience in periodically inserting enclosures in utility bills.

I. ARGUMENT

BECAUSE PUBLIC UTILITIES ARE REGULATED MONOPOLIES, THEY ARE ROUTINELY REQUIRED TO INCLUDE MESSAGES IN THE UTILITY ENVELOPE WHETHER OR NOT THEY AGREE WITH THOSE MESSAGES.

A chronicle of the history of utility regulation is a dramatic reminder of the serious public policy

considerations which emerge because public utilities are sanctioned by the state as monopolies. Insulated from competition, public utilities enjoy a wide range of privileges and economic advantages that competitive businesses and entrepreneurs can only dream of -- advantages including the exclusive right to provide a basic customer service in a specific geographical territory; the right of eminent domain; and a lower cost of capital -- to name but a few. Although public utilities are directed to provide adequate service at reasonable rates, customers are deprived of the competitive protections of the marketplace.

In its Jurisdictional Statement, PG&E assumes that with respect to periodic customer billings it should be treated by the state no differently than the Bank of America (J.S. p. 11). That comparison is inherently flawed in that it fails to distinguish between a competitive business and a monopoly utility. Dissatisfied customers of the Bank of America can pull their money out and go down the street to the bank, credit union or savings & loan institution of their choice. But customers of gas, electricity, water and local telephone utilities are economic captives. They cannot switch to competitors if they object to unfair rates or unsatisfactory service.

The identical public interest considerations which early in this century led to the extraordinary state sanctioning of public utilities as monopolies also compelled states to regulate public utilities.[2] As part

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2. For a historic discussion of the economic and legal rationale of the regulation of public utilities (including examples of how utilities are distinguished from other businesses because of the advantages they enjoy) see:

Paul J. Garfield and Wallace F. Lovejoy, Public Utility Economics (Englewood Cliffs, New Jersey: Prentice-Hall, 1983), pp. 1-3; Barry M. Mitnick, The Political Economy of Regulation (New York:

of that exercise of authority, commissions regularly require utilities to carry messages in the utility envelope -- whether or not the utility agrees with that message.

Does anyone think that utilities want to tell ratepayers of:

*their right to attend public hearings and to protest proposed rate hikes
*their right to have their deposit returned with interest
*their right to a rate refund
*eligibility standards for obtaining free weatherization and retrofit services?[3]

As a proper extension of their regulatory responsibilities, commissions are authorized to assess non-utility related messages from other entities so as to determine whether and how such costs should be

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(cont.)

Columbia University Press, 1980), pp. 88-94; Li Way Lee, "A Theory of Just Regulation," The American Economic Review 70 (5) (1980), pp. 848-862; James Q. Wilson, "The Politics of Regulation," Social Responsibility and the Business Predicament, James W. McKie, ed. (Washington, D.C., The Brookings Institution, 1974), pp. 135-168; Clair Wilcox and William G. Shepherd, Public Policies Toward Business, 5th ed. (Homwood, Ill: Richard D. Irwin, 1975) pp. 333-350; Douglas Needham, The Economics and Politics of Regulation (Boston: Little, Brown and Company, 1983) Chapter 2 "Reasons for Regulation"

3. Examples of Wisconsin Public Service Commission-mandated notices: Wis. Adm. Code, S. PSC 2.73(1); [requires notice of rate requests]; 113.12(4) [electric deposit and dispute rules]; 134.05(4) [gas deposit and dispute rules]

allocated between ratepayers and shareholders. Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980).

To conclude that regulators of monopolies cannot require the inclusion of messages with which the utility disagrees is to implicitly conclude that regulatory agencies and licensing boards of non-monopolies (such as banks, insurance companies, etc.) could not require messages in their periodic billings with which the regulated company may disagree. Such a conclusion would turn regulatory and administrative law on its head.

II. ARGUMENT

IN A RATIONAL EXTENSION OF THE STATE'S POWER TO PROTECT MONOPOLY RATEPAYERS, STATES ALLOW DESIGNATED RATEPAYER ORGANIZATIONS ACCESS TO THE UTILITY BILLING ENVELOPE.

A) UTILITIES THEMSELVES RECOGNIZE THE BILLING ENVELOPE AS THE PRACTICAL AND OPTIMUM METHOD FOR COMMUNICATING WITH RATEPAYERS.

Common sense and practical considerations make clear that the utility billing envelope is the mechanism most likely to reach the maximum number of ratepayers. The utilities themselves use a variety of methods for getting their messages to the ratepaying public: speakers' bureaus, print and electronic media, bumper stickers, distribution of promotional materials to school children and civic organizations, etc. As recognized by the the utilities, it is the utility envelope which is the most effective mechanism.

For example, in the discovery phase of a recent Madison Gas and Electric (MG&E) rate case, CUB secured a customer survey[4] which MG&E had performed to determine the comparative effectiveness of different methods of communicating with ratepayers. MG&E's survey concluded that bill stuffers were even more effective in reaching ratepayers than television, radio, or newspaper advertising.

"CUSTOMER SATURATION BY MEDIUM"

Newspaper	41%
TV	68%
Radio	32%
Billing Stuffer	81%*

*"When asked about the bill stuffers on conservation, 81% responded that they had not only seen, but had read energy conservation materials included with the bill."

B) NON-UTILITY RELATED ORGANIZATIONS SEEK OUT THE UTILITY BILLING ENVELOPE IN THEIR DESIRE TO REACH LARGE NUMBERS OF PEOPLE IN THE MOST COST EFFECTIVE MANNER.

Even the Federal Government, for example, has sought access to the utility envelope. The

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4. MG&E response to CUB Data Request No. 15, Docket No. 3270-UR-12

Wisconsin Public Service Commission has had to wrestle with the issue of two Wisconsin telephone companies having placed Selective Service draft registration notices in the utility bill.[5]

In its brief, PG&E says "...the limited space in (its) billing envelopes, which has always been limited to PG&E's private use and occasional legal notices, cannot accommodate outside speakers without governmental entanglement in selecting the speakers." (Br. 20) (Emphasis supplied).

In light of that strong PG&E statement, it is difficult to reconcile PG&E's recent decision[6] to allow the National Center for Missing and Exploited Children to use PG&E's billing envelope. According to George Lawrence, President of amicus American Gas Company, AGA is helping coordinate an effort that may lead to photographs of missing children being included in gas bills by most of AGA's 300 member gas utilities. Thus each state commission will undoubtedly soon have to review this non-utility related message under its own standards and determine what cost allocation implications it poses. A copy of the relevant wire story is included as Attachment 3.

C) AS A RATIONAL COROLLARY TO CUB'S STATE-MANDATED OBLIGATIONS, THE WISCONSIN LEGISLATURE EXPRESSLY

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5. Wisconsin Public Service Commission Docket: Proposed Tariff On Small Bill Inserts (1983)
6. In a July 11, 1985 telephone conversation, CUB Program Director, Gary Becker, was told by American Gas Association (AGA) Communications Department representative, Wendy Jones, that PG&E is among the AGA participants in the "Missing Children" promotion.

ALLOWS CUB TO INCLUDE AN ENCLOSURE IN THE UTILITIES' PERIODIC CUSTOMER BILLING ENVELOPE TWO TIMES PER YEAR.

Like the PSC, Wisconsin CUB does not have access to the mailing lists of the utilities.

Like the utilities, CUB recognizes that anything short of an enclosure would not reach the maximum number of ratepayers.

Like the PSC, Wisconsin CUB is directed by the state to assume a very specific role in the ratemaking and consumer education process and of necessity must communicate with ratepayers to fulfill that role. The state provided CUB with the enclosure right so those mandates could be effectively achieved.

Unlike the utilities, CUB does not have the economic resources to tap every communication resource — television, radio, newspaper, direct mail, speakers' bureaus, promotional literature and bill stuffers. If ratepayers had the practical opportunity to organize themselves and accumulate anything close to those levels of resources, the state would not have needed to create a CUB in the first place.

At the time CUB legislation was being considered in Wisconsin, the PSC Chairman, Charles J. Ciccheti, explained:

> "I believe the advocacy equation is unbalanced. The staff is in the middle, and in Wisconsin I believe it performs exceptionally well in this objective capacity. But utility companies hire numerous highly-paid consultants and outside counsel

to complement their own staff experts and attorneys. This is not wrong, but citizens should also have an effective advocate. This should be outside of government."

...

"I further believe the quality of citizen intervention will be improved if greater resources are put in the hands of citizen intervenors."

...

"But, even in Wisconsin, most intervenors cannot put on a positive case, which is an organized presentation of testimony on one or more alternatives. Because of this, they must use the technique of a negative case, which depends upon cross-examination and court appeals as the tools of advocacy. This type of case is time consuming and does not always improve regulation. CUB would focus resources to improve the regulatory climate for electric and gas utilities, intervenors and Commission alike." (Letter to Senator Dorman, March 22, 1978.)

Chairman Ciccheti's views were echoed by his colleague, Commissioner Edward M. Parsons, Jr.

> "Very little, if any, expert testimony is provided by consumers. Such persons or groups are lacking in the expertise and financial underpinnings necessary to put in a solid case."
>
> ...
>
> "Consumer input organized in the most efficient form is essential if we are to reduce regulatory lag and if the Commission is to be provided with the most informed data which will be the basis for its decisions. The most viable proposal I have seen for Wisconsin is the Citizens Utility Board. It is for these reasons that I recommend the CUB legislation for adoption by the Wisconsin Legislature." (Letter to Representative Wahner, February 10, 1978.)

This was typical of voluminous testimony supporting creation of a Wisconsin Citizens' Utility Board. Such legislation was in keeping with Wisconsin case law which recognizes that the role of the PSC is to be a judge, not an advocate for any one interested party, including

the ratepayer.[7]

III. ARGUMENT

THE DAY-TO-DAY PRACTICAL LOGISTICS OF THE CUB ENCLOSURES DEMONSTRATE THAT PG&E'S ANXIETIES ARE MISPLACED.

A) THE INCLUSION OF CUB ENCLOSURES HAS NOT HINDERED THE UTILITIES FROM SPEAKING TO RATEPAYERS.

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7. PSC May Not Advocate One View: Muench v. PSC (261 Wis. 492) (August 1951) "...To hold that the PSC should not only decide between these conflicting interests in its judicial capacity but also should represent the state in protecting public rights would make the commission judge and advocate at the same time. Such a concept violates our sense of fair play and due process..."; Wisconsin Telephone v. PSC (232 Wis. 274) (August 1939) "...the commission should make every effort to act in a fair and impartial manner...they represent the interests of the state and are not concerned with anything but the establishment of a lawful and reasonable rate. They are not, as attorneys are, endeavoring to win a case...". PSC Staff Must be Impartial: Wisconsin Telephone v. PSC (supra): "The commission is of course charged with the duty of seeing that the work of its staff is done in a fair and impartial manner if it is to be accepted as a basis of decision..." PSC 2.32 (2) "Members of the commission staff appear neither in support nor opposition to any cause, but solely to discover and present, if necessary, facts pertinent to the issues." PSC Commissioner Matthew Holden, Waukesha Freeman 3/30/77 "The Commission staff is supposed to represent the public interest from a variety of points of view...it functions mainly as an information gatherer." (p.3)

The state has not deprived the utilities of their access to the "soapbox" which a utility billing envelope represents. The state is only saying that this soapbox should be shared with the intervenor designated to represent economically captive ratepayers who pay for that envelope.

The state is not restricting the time, place, manner, or even content of the utilities' messages. It is properly promoting a wider and more spirited debate of important public issues.

Wisconsin CUB has used 31 enclosure texts in 91 enclosure cycles during the past five and one-half years. Yet amici WSTA and Wisconsin Bell single out only one text as a "horror story" (WSA/Wis. Bell Br. pp. 2, 11). In an enclosure sent to gas, electric and telephone companies, CUB explained its opposition to a recent FCC long-distance access charge decision.

No Wisconsin utility formally or even informally objected to CUB or to the PSC about that text -- a text which includes language explicitly saying:

> **"CUB SAYS THERE IS NO ECONOMIC OR LOGICAL JUSTIFICATION FOR A LONG DISTANCE ACCESS FEE. BUT DON'T BLAME THE PSC OR (NAME OF UTILITY)."**

Indeed, the amici Wisconsin telephone companies have not supported the long distance access fee which was the subject of this supposedly controversial enclosure text.

It should also be remembered that the utilities still have (and frequently utilize) the "last word" in the billing envelope. As part of CUB's

enclosure process, the exact text of CUB's enclosure is in the possession of the utility six to eight weeks before the actual enclosures are delivered to their loading dock for stuffing. And the utilities have often taken advantage of their opportunity to respond to CUB's enclosure right in the very same month's billing envelope that contains CUB's enclosure. In the past four months alone, two major utilities have done just that.[8] Each utility is able to informally and formally challenge the language of CUB's enclosure.[9]

B) THE UTILITIES ARE NOT "COMPELLED TO ASSOCIATE"

Appellant PG&E is concerned that it would be "compelled to associate" with TURN and would be victimized by the fact that confused ratepayers would think the TURN message is from PG&E. Even without a disclaimer, it is hard to imagine that ratepayers would read a TURN message and mistake it for a utility communication. There certainly has been no such problem in Wisconsin. Indeed, if the CUB enclosures were being mistaken for a pro-utility message, it is difficult to conceive that utilities would be so virulent in their anti-CUB literature.

Practical considerations are also relevant. Wisconsin law imposes no such disclaimer requirement on CUB, but as a logical marketing practice, CUB enclosures prominently tell the reader on the outside of the envelope:

---

8. Wisconsin Electric Power Co. (April 1985); Wisconsin Power & Light Co. (May 1985).
9. Wisconsin Public Service Commission Directive (January 20, 1984).

"THIS MESSAGE IS NOT FROM YOUR UTILITY!"

After all, why would a ratepayer intervenor risk being confused with a utility?

C) COST CONSIDERATIONS

The CUB enclosures do not impose additional costs on the utility or its shareholders.

Printing Costs

CUB prints and pays for the enclosures independently of the utility.

Administrative Costs

CUB has reimbursed utilities for the costs (including interest) the utilities have incurred in administering CUB's enclosure. Those reimbursement costs have ranged from $250 to $1,300 per enclosure cycle.

Postage Costs

CUB'S enclosure has always weighed 1/10 of an ounce. Only once has there been a postage dispute (following close on the heels of the new billing procedures associated with the divestiture of AT&T). This $2,000+ dispute is in litigation.[10]

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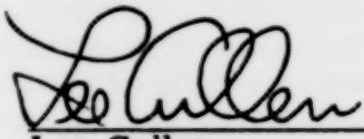
10. Citizens' Utility Board v. Wisconsin Bell, Inc., Case No. 84-CV-4693.

CONCLUSION

In a rational extension of the state's power to protect monopoly ratepayers, states allow designated ratepayer organizations access to the utility billing envelope. Such ratepayer messages impose no time, place, manner, or content restrictions on the utility.

Such enclosures promote vigorous public debate of important issues through a mechanism which enhances public participation in the ratemaking process. Neither the utilities nor their shareholders incur additional costs because of the enclosure, nor does the enclosure unconstitutionally force the utility to "associate" with the ratepayer intervenor.

Respectfully submitted,



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July 19, 1985

ATTACHMENT 1

Relevant Provisions
Chapter 199

PURPOSE

CUB's statutory purpose:

> "is to promote the health, welfare and prosperity of all the citizens of this state by ensuring effective and democratic representation of individual farmers and other individual residential utility consumers before regulatory agencies, the legislature and other public bodies and by providing for consumer education on utility service costs and on benefits and methods of energy conservation. Such purpose shall be deemed a statewide interest and not a private or special concern." Wis. Stats §199.02.

CUB represents the customers of Class A utilities (gas, electric, or water utility with an annual gross operating revenue of $2.5 million or more or any telephone utlity with annual total gross operating revenues of $1,600,000 or more on November 29, 1979. §199.03(4). CUB does not represent the interests of the customers of municipally-owned utilities or cooperatives.

DUTIES

Among the many duties the state has imposed on CUB are the obligations to:

> *Represent and protect the interests of the residential utility consumers of this state. §199.05(2)(a)

> *Inform, insofar as possible, all residential utility consumers about CUB, including the procedure for obtaining membership in CUB. §199.05(1)(b)

ATTACHMENT 1
Continued

*Make available to all residential utility consumers information on utility service costs and on benefits and methods of energy conservation. §199.05(1)(c)

*To intervene as a party or otherwise participate on behalf of residential utility consumers in any proceeding which affects the interests of residential utility consumers. §199.05(2)(d)

RESTRICTIONS

Non-Partisan

In creating CUB, the legislature expressly stated that CUB must be nonpartisan and

> "may not sponsor, endorse, or otherwise support nor may it oppose any political party or the candidacy of any person for public office." §199.15

Other Requirements

The legislature specified the manner in which CUB's board of directors would be elected (§199.12); required an annual membership meeting to be held in different districts on a rotating basis (§199.08); set the eligibility and dues structure for membership (§199.0491); and subjects CUB to Public Records requirements (§199.125).

ATTACHMENT 2

CUB 1984
ANNUAL REPORT
(SUMMARY)

MEMBERSHIP:	More than 118,000 residential utility consumers have joined CUB.
REVENUES:	$754,011
CUB PARTICIPATION IN PSC RATE CASES AND GENERIC PROCEEDINGS:	30 proceedings
CUB PARTICIPATION IN LITIGATION:	4 Lawsuits
CUB LEGISLATIVE ACTIVITIES:	8 issues
CUB CONSUMER EDUCATION PROJECTS:	7 projects
CONSUMER COMPLAINT AND INQUIRIES:	CUB responded to hundreds of complaints and inquiries regarding the service of virtually every major utility (14) in addition to dozens of smaller utilities.
PUBLIC APPEARANCES:	More than 100.

ATTACHMENT 3

Wisconsin State Journal
April 4, 1984

'Missing' photos in gas bills

© Orlando Sentinel

WASHINGTON — Missing-children photos will be tucked into gas bills by utilities around the country.

"This campaign is a natural evolution of efforts launched to date," Jay Howell, executive director for the National Center for Missing and Exploited Children, said Wednesday. "With this campaign, we are targeting the whole country."

Four months ago, the center and milk distributors began putting missing-children photos on milk cartons.

Some 60 gas utilities in 42 states agreed to put pictures of two missing children in the bills each month.

George Lawrence, president of the American Gas Association, which is helping coordinate the effort, said most of the group's 300 member companies will join soon.

Nancy Reagan will be honorary chairwoman of the National Child Watch Campaign.

Sen. Paula Hawkins, R-Fla., who spent this week strengthening her claim to the title of the "children's senator," expressed the hope that the campaign not only would lead to clues about missing children but would encourage parents to have their children photographed and fingerprinted.

On Wednesday, she attended a conference to promote awareness of exploited and missing children.

On Tuesday, she introduced legislation that seeks to provide no-fault compensation for children who have adverse reactions to vaccines. The bill also seeks to ensure improved safety standards and adequate supplies of medicine.

She has introduced a bill that would institute special legal procedures for prosecuting child molesters. These procedures are designed to spare and protect children from the trauma of cross-examinations and courtroom confrontations with defendants.

The related issues of vaccine and compensation provoked controversy. With courts awarding large settlements to victims, insurance costs escalated, prompting drug companies to withdraw from the vaccine market. Less competion reduced the supply of vaccines and increased costs.

(32)

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CLERK

No. 84-1044

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *ET AL.*,
Appellees.

On Appeal from the Supreme Court of California

JOINT BRIEF FOR THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICI CURIAE

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *ET AL.*,
Appellees.

On Appeal from the Supreme Court of California

JOINT BRIEF FOR THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICI CURIAE

INTEREST OF AMICI CURIAE

The National Association of State Utility Consumer Advocates (NASUCA) and the National Association of Regulatory Utility Commissioners (NARUC) file this joint brief as *amici curiae* urging affirmance due to the substantial harm a reversal of the decision below will have upon the effectiveness of the regulation of investor-owned utilities by State regulatory commissions. The NASUCA and the NARUC submit this brief with the written consent of the Appellant and Appellees which is filed with the Clerk, pursuant to Supreme Court Rule 36.2.

The NASUCA is a national organization comprised of 37 members in 34 States and the District of Columbia which represent the interests of utility consumers before State regulatory commissions. The members of NASUCA primarily represent consumers in State commission proceedings, and State and Federal court actions involving investor-owned electric, natural gas, telephone and water and sewerage utilities.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The Public Utilities Commission of the State of California (CPUC), Appellee herein, is a member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating electric utility companies within their respective borders. As such, these officials have the obligation to assure the establishment of electric utility services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable. The State regulatory commissions are the creatures of State constitutions or their respective legislatures, established to regulate utilities exercising monopoly powers within their service territories.

With rare exception, each utility subject to the jurisdiction of a State regulatory commission communicates with its ratepayers through the monthly or quarterly billing mechanism. According to information collected by the

NARUC, every State commission in the Nation regulates the billing practices of its jurisdictional utilities, including the authority to establish the type, kind and extent of information a utility must provide its customers.[1] The purpose of this type of regulation, *inter alia,* is to enable utility consumers to understand their charges for utility service, to calculate their bills through an itemized listing of their consumption, and to be provided other information affecting their economic interest as utility ratepayers.[2]

In the proceeding at bar, the California Supreme Court has affirmed an order of the CPUC requiring a jurisdictional utility (Pacific Gas & Electric Company, Appellant herein) to include in billing envelopes information provided by third parties. The NASUCA and the NARUC are deeply concerned that a reversal by this Court of the CPUC's decision will threaten the authority not only of States such as California which have established third party bill insert programs, but also will apply more broadly, leading utilities to question the authority of the State commissions to impose any requirements or restrictions on utility billing practices. Viewed in this light, this proceeding is of great importance to each State commission and to the consumer advocates that appear in State regulatory proceedings, regardless of whether or not a State has a third party insert program. Simply stated, the resolution of the issues raised in this case will affect State commissions and utility consumers nationwide.

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[1]National Association of Regulatory Utility Commissioners, *1983 Annual Report on Utility and Carrier Regulation* (Washington, D.C. 1984) at 566-573.

[2]*Id.*

ARGUMENT

I. APPELLANT HAS FAILED TO SHOW THAT THE CALIFORNIA PUBLIC UTILITIES COMMISSION HAS LIMITED ITS ABILITY TO COMMUNICATE WITH ITS CUSTOMERS.

Appellant Pacific Gas and Electric Company (PG&E) argues in its brief on the merits that the Order of the Supreme Court of California denying review of the CPUC decision limits its ability to communicate with its customers as a result of the inclusion of the Toward Utility Rate Normalization (TURN) insert in the billing envelope four times a year. Appellant argues that the ordered inclusion will replace its own publication, *Progress,* and thus restrict its ability to communicate with its ratepayers. (PG&E Br. at 11-13)

This argument has no merit. The CPUC decision does not bar PG&E from including *Progress* in the billing envelope with the TURN material. Appellant may include its own publication twelve months of the year. Four months of the year, however, it must also include a publication from TURN. The Order's only impact on PG&E's communication with its customers is the possibility that the inclusion of additional printed material with the mailing could result in the payment of additional postage. This extra cost, if in fact extra postage were required, creates no claim under the First Amendment.

Moreover, it neither prevents PG&E from communicating with its customers nor discriminates against the utility. PG&E would still be required to pay for use of postal service just as any other nonmonopoly company. The utility's status as a regulated monopoly means simply that any additional postage costs, should they occur, will be allocated by the CPUC among shareholders, ratepayers, and third party mailers such as TURN in accordance with State law and traditional regulatory principles. The First Amendment does not relieve PG&E from being required to "pay postage in a manner identical to other Postal Service patrons. . . ." *United States Postal Service v. Greenburgh Civic Associations,* 453 U.S. 114, 127 (1981). Indeed, the CPUC could have required the appellant's shareholders to bear the cost of mailing *Progress* to its customers from the outset. *Rochester Gas & Electric Corp. v. Public Service Commission,* 51 N.Y. 2d 823, 413 N.E.2d 359, 443 N.Y.S.2d 420 (1980), *appeal dismissed,* 450 U.S. 961 (1981). Therefore, the fact that the CPUC, or any State commission, requires a utility to include material in its billing envelope that in turn forces the utility to pay additional postage for non-required materials does not restrict the free speech rights of the utility company. It only means that the utility must pay the same costs as any other speaker to transmit its message.

II. THE QUESTION OF THE OWNERSHIP OF THE "EXTRA SPACE" IN THE BILLING ENVELOPE IS NOT BEFORE THE COURT.

PG&E and certain *amici* in support argue that the forced inclusion of the TURN billing insert improperly requires the utility to use *its* property to disseminate TURN's speech. (*See e.g.,* PG&E Br. at 11-13) This argument, although of superficial appeal, cannot withstand close scrutiny.

In a previous case, the CPUC determined that there is "extra space"[3] in the billing envelope and that space is paid

[3]The extra space results from the fact that the United States Post Office requires the payment of a set minimum amount per envelope for postage. The bill and return envelope do not weigh enough to use the full amount paid for. Thus the company is able to use that extra space to insert its own publication without incurring any additional postage.

for by ratepayers and is thus ratepayer property.[4] (Decision 93887, J.S. App. A-67, A-72, Paragraph 58). Under California procedures, the finding that the extra space has value that belongs to ratepayers cannot be relitigated, and therefore, is an issue not properly before this court. A decision which the California Supreme Court has refused to review is final and is *res judicata* to the issue. *People v., Western Air Lines, Inc.*, 42 Cal.2d 621, 268 P.2d 723 (1954); *Consumers Lobby Against Monopolies v. PUC*, 25 Cal.3d 891, 160 Cal. Rptr. 124, 603 P.2d 41 (1979). Therefore, the Court should not decide this ownership issue.

III. THE DECISION OF THE CPUC WITHSTANDS FIRST AMENDMENT CHALLENGE EVEN IF THE "EXTRA SPACE" WERE NOT RATEPAYER PROPERTY.

Under the facts of this case, there is no need to address the usual First Amendment questions. The CPUC decision does not in any way significantly interfere with the ability of PG&E to communicate with its customers. It neither restricts the content of any utility messages nor prohibits any communications. However, PG&E has failed to raise a substantial free speech issue even under traditional First Amendment analysis. The utility's contention that the CPUC decision favors third party speakers is simply misplaced. The regulatory decision merely requires that PG&E include more than its own speech in the billing en-

[4]Justice Blackmun has suggested this very result in a decision involving State regulation of the utility billing envelope: ". . . States might use their power to define property rights so that the billing envelope is the property of the ratepayers and not of the utility's shareholders . . . If, under State law, the envelope belongs to the customers, I do not see how restricting the utility from using it could possibly be held to deprive the utility of its rights." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 556 (1980) (Blackmun, J. dissenting).

velope. The CPUC found that its decision served a compelling governmental interest in the context of a regulated monopoly, because the Commission specifically found that consumers would benefit from exposure to more than one point of view, and that there was no adequate substitute to communication through the billing envelope.[5] To eliminate confusion concerning the source of the third-party message, the CPUC requires that any third-party enclosure state that its content are not endorsed by the Commission or PG&E. The Commisison has not attempted to prevent PG&E from inserting its own material opposing the TURN issues.[6]

In a recent decision involving State regulation of utility bill inserts, this Court stated that "where the government restricts the speech of a private person, the State action may be sustained only if the government can show that the regulation is a precisely drawn means of service a compelling State interest." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980). However, when the material to be regulated is content-neutral, these stringent standards need not be applied. *Id.* at 538. Content-neutral regulation is acceptable if it is narrowly tailored to serve a significant governmental interest and leaves ample alternatives for communication. *Clark v. Community for Creative Non-Violence*, 468 U.S. ____, 82 L.Ed.2d 221 (1984).

Despite PG&E's arguments to the contrary, the CPUC's decision to require third-party bill access in a content-neutral manner serves substantial and important governmental interest, namely to: (1) promote more complete

[5]*See* Appendix to CPUC Motion to Dismiss at A-27, A-36.

[6]*Id.* at A-28, A-39.

understanding of energy-related issues; (2) further consumer participation in Commission proceedings; (3) prevent the utility from taking for itself the economic value of the extra space owned by ratepayers; (4) remedy PG&E's violation of Federal ratemaking standards preventing utilities from conducting political advertising at ratepayer expense. (App. to CPUC M.D. at 8, 26-28, 32).

We submit that the governmental interest in widening the scope of involvement in the regulatory process is substantial. The CPUC, as an expert in the conduct of its own proceedings, determined that the best way to insure greater participation in its proceedings was to allow TURN to solicit funds through billing envelopes and to use those funds to represent the collective interest of PG&E's ratepayers in CPUC rate cases. Such a determination prevents the utility owners from benefitting from ratepayer-owned property, and also remedies prior unlawful use of that space.

PG&E also claims that the CPUC decision requires it to be associated with the views of others in violation of its rights under the Constitution. In making such an argument, the utility relies primarily on *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974) and *Wooley v. Maynard,* 430 U.S. 705 (1977). PG&E Br. at 15-17. However, the recent *Zauderer* decision suggests that the California Supreme Court correctly upheld the CPUC decision. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. ____, 85 L.Ed.2d 652 (1985). There the Court upheld the right of free speech of Zauderer, but held, after citing *Tornillo* and *Maynard,* that Ohio could require certain disclosure requirements on ads to insure that they are not deceptive.

In *Tornillo,* the Court struck down a Florida statute

which required that a newspaper publish replies to charges made by the newspaper against a political candidate's personal character. 418 U.S. at 258. In so doing, the Court found that the attempt by the State to provide this "right of reply" constituted an unconstitutional "intrusion into the function of editors" by dictating the outcome of editorial decisionmaking. *Id.* In the case at bar, the CPUC has successfully avoided such direct editorial interference through its content-neutral scheme of third party access to PG&E's bill envelopes.

In *Maynard,* the Court held that the State of New Hampshire could not require its licensed drivers to display the State motto upon their vehicle license plates, since the State's interest to disseminate an ideology was too tenuous and since appellees were required to disseminate the motto publicly. 430 U.S. at 717. The Court in *Zauderer,* however, noted that the interests at stake there were different from *Tornillo* and *Maynard,* and focused on the concept of the value to consumers of commercial speech in upholding the State of Ohio's disclosure requirement scheme designed to prevent deceptive advertising. 85 L.Ed. 2d at 672.

The Court was clearly cognizant that such requirements implicated the advertiser's First Amendment rights to some extent but found the State's interests in aiding consumers to outweigh any burden resulting from disclosure. *Id.* at 673. In the instant case, the CPUC requires a disclaimer on TURN inserts but has not unconstitutionally sought to restrict the speech of the utility or qualified third parties chosen through a reasonable selection process. PG&E is not prohibited from replying to third party messages. Here the State regulator, as the replacement for competition in the marketplace, is in the best position to determine whether use of extra space in billing envelopes is

the best means for dissemination of information necessary to accomplish the substantial governmental interest of furthering consumer participation in rate proceedings. The only subclass of the public who would be receiving the third party messages under the CPUC plan are the ratepayers who are directly affected by that utility's approved rates and charges.[7] Appellant is neither prohibited nor compelled to speak. Its First Amendment rights may be implicated to some extent by the CPUC requirement of dissemination of TURN information, but they are not overly burdened, given the significant State interest in furthering consumer participation in rate proceedings and given the status of PG&E as a monopoly franchise providing utility service by choice in California. Applicants for rate increases, like PG&E, bear the burden of proving the reasonableness of their rate requirements, and commissions, like the CPUC, legitimately may seek to further consumer participation in proceedings to have additional facts before it during its deliberations. The CPUC has thus properly established reasonable regulation of access to the extra space in the billing envelope.

PG&E's claim that it is forced to be associated with the speech of another is also negated by this Court's decision in *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980). There the Court concluded that the State of California could require the owners of a privately-owned shopping center to permit outside parties to collect signatures on petitions and distribute literature without infringing the owners' First Amendment rights. In reaching this

[7]In response to fears conveyed in *Maynard* regarding obliteration of the "In God We Trust" motto on U.S. currency, the Court observed that the bearer of currency is not required to advertise publicly the national motto. 430 U.S. at 717, n. 15. In the instant case Appellant is likewise not being required to disseminate information to the general public but only to its ratepayers.

conclusion, the Court found a number of characteristics which permitted the State to require that the public be granted access. First, although the owners of the shopping center sought to prevent persons from collecting signatures on a petition on its property, the shopping center was by choice open to public use. It was of such a size as to encompass several city blocks so that speakers and persons circulating letters and petitions were not likely to be identified with the owner. Second, the State had not attempted to dictate the content of anyone's speech. Third, the property owners were free to disclaim sponsorship of any petitions and to communicate their own messages if they wished. 447 U.S. at 87.

In like manner, PG&E is free to deny association with the TURN material. In fact, the CPUC order specifically requires TURN to label its material in such a way as to make it clear that neither PG&E nor the Commission sponsored the material. The utility is also a business open for public use, but unlike the shopping center is granted a monopoly status by the State. As such, it is subject to regulation by the State for the benefit of utility ratepayers. The CPUC decision represents a reasonable accommodation of the free speech interest of utilities and the interests of consumers in improved participation in the process of economic regulation of monopoly utilities.

CONCLUSION

For the foregoing reasons, the decision of the CPUC must be affirmed.

Respectfully submitted,

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Appellees.

On Appeal From The Supreme Court Of California

BRIEF OF NEW YORK CITIZENS' UTILITY BOARD, INC. AND UTILITY CONSUMERS ACTION NETWORK AS *AMICI CURIAE* URGING AFFIRMANCE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

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Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,

Appellees.

BRIEF OF NEW YORK CITIZENS' UTILITY BOARD, INC. AND UTILITY CONSUMERS ACTION NETWORK AS *AMICI CURIAE* URGING AFFIRMANCE

INTERESTS OF AMICI*

New York Citizens' Utility Board, Inc. ("New York CUB") is a nonprofit membership corporation organized in 1984 under the laws of the State of New York. It was formed in connection with a proceeding before the New York Public Service Commission ("PSC") concerning the representation of the interests of residential utility consumers before the PSC. New York CUB sought permission to enclose its notices in the billing envelopes of certain utility companies in New York, and the PSC tentatively granted that request upon determining that the group's structure, purpose, and proposed

* All parties have consented to the filing of this brief.

activities conform to the guidelines established in its *Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes,* Case 28655 (May 14, 1984). *See* J.S. App. A-111 to A-141. The inserts, which would be paid for by New York CUB, would invite utility customers to become members of New York CUB and to participate in its activities. The PSC decided that permitting access by New York CUB would foster representation of the interests of residential ratepayers in PSC proceedings. However, implementation of that decision has been held in abeyance as a result of litigation brought by seven affected utilities, which has resulted in a trial court determination that the *Statement of Policy* is unconstitutional. *Consolidated Edison Co. v. Public Service Commission,* 488 N.Y.S.2d 352 (Sup. Ct. Albany Cty. 1985), *appeal pending* (3d Dept. No. 50109). Because the issue upon which the New York court has ruled is virtually identical to that raised by appellant Pacific Gas and Electric Company ("PG&E"), the outcome of this case is likely to have a direct and substantial impact on New York CUB.

Utility Consumers Action Network ("UCAN") is a nonprofit corporation created in 1983 under the laws of California to represent the interests of residential and small business ratepayers of San Diego Gas and Electric Company ("SDG&E") in regulatory and legislative proceedings. UCAN was granted access to the billing envelopes of SDG&E in California Public Utility Commission ("PUC") Decision No. 83-04-020, which was issued on April 6, 1983, and which became effective 30 days later. J.S. App. A-90 to A-110. Under that decision, UCAN was permitted to enclose its notices in the billing envelopes four times per year, at no cost to SDG&E, during a two-year experimental period. Through such mailings, UCAN attracted approximately 70,000 members. Even though the minimum dues for UCAN are only $4.00 per year, inclusion of the bill inserts has permitted UCAN to raise enough money to participate in six major PUC proceedings involving SDG&E. Shortly before the original two years of access expired on May 6, 1985, UCAN sought extension

or renewal of the program for an additional five years. The PUC recently ruled that it will grant UCAN temporary access to the billing envelopes pending a decision on the request, but it stayed the effectiveness of its order until this case is decided. Decision No. 85-07-014 (July 10, 1985). Thus, the outcome of this case will directly affect UCAN's ability to obtain authorization to continue inserting enclosures in SDG&E's billing envelopes as it has done for the past two years.

SUMMARY OF ARGUMENT

Appellant PG&E and the 16 *amici* supporting its position advance an array of arguments for the unconstitutionality of the decision allowing appellee Toward Utility Rate Normalization ("TURN") to include a flyer four times a year in PG&E's billing envelopes. However, the core of their case boils down to the fact that the access order would require PG&E to carry the messages of a third party (that is, TURN) with which it may disagree. *See* PG&E Brief at 10-27. PG&E argues that the mailings mandated by the PUC infringe upon the utility's constitutional rights, and that therefore the Commission must show that the infringement is justified by a compelling state interest, which it contends has not been done. *See* PG&E Brief at 27-40.

This brief will not attempt to canvass all of the issues in this case, nor to answer each of the arguments made by appellant and those supporting it. Rather, New York CUB and UCAN wish to focus on the infirmity of the unarticulated premise that underlies PG&E's entire case—the assumption that regulated utility corporations enjoy a "right not to speak" which is in all respects the equivalent of an individual's right *to* speak.

PG&E's argument is flawed in three principal respects. First, the "right not to speak" relied upon in *Wooley v. Maynard,* 430 U.S. 705 (1977), and similar cases has its origins in the concept of "freedom of thought," which has a very narrow ambit when applied to business corporations, which can speak but cannot "think". Second, this Court has recognized that the right not to speak, even as invoked by natural persons, is much narrower than

the right to speak, particularly when a regulatory body seeks to require additional statements or disclosures by one who has chosen to speak on a particular subject. PG&E seems to assume that these two very different rights are coextensive and that, as a result, there is a right not to speak under all circumstances in which a governmental prohibition on speech would be improper. Third, PG&E has discussed a number of hypothetical and speculative circumstances under which it claims that its First Amendment rights would be violated by the PUC order under challenge. However, those conjectures provide no basis for striking down this program, particularly since the actual experience in California and elsewhere has shown that the parade of horribles offered up by PG&E is unlikely to come to pass, and that any difficulties that did arise could be dealt with by means far less drastic than eliminating the entire program.

ARGUMENT

A REGULATORY PROGRAM WHICH PERMITS LIMITED ACCESS BY A CONSUMER GROUP TO BILLING ENVELOPES DOES NOT VIOLATE A UTILITY'S FIRST AMENDMENT RIGHTS.

A. *Regulated Utilities Have No "Right Not To Speak" Which Is Comparable To That Of Natural Persons.*

Appellant's first error is its failure to analyze the rationale which underlies the "right not to speak" on which it bases its argument. Thus, in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978), this Court held that corporations enjoy the right of free speech. But it also recognized that certain purely personal constitutional rights are available only to natural persons. "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Id.* at 779 n.14. Under this standard, as we now demonstrate, the right relied on by PG&E, which protects individuals from compelled affirmations, is not available to PG&E, since to apply it in the present context would ignore the nature, history, and purpose of the protection being invoked.

In seeking to establish an invasion of its First Amendment rights, PG&E places its principal reliance on *Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530 (1980), which held that a utility could not be prohibited from sending inserts about controversial topics to its ratepayers in their billing envelopes, and on *Wooley v. Maynard,* 430 U.S. 705 (1977), *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), and *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), each of which recognized the existence of a right not to communicate or not to associate under certain circumstances.

But in making its argument, appellant never addresses the question of when, if ever, the "right not to speak" is available to corporations, particularly to heavily-regulated monopolies like PG&E. *Consolidated Edison* certainly does not establish any "right not to speak" for utility corporations. Although PG&E mentions that the origin of the doctrine it relies on is found in such cases as *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), it glosses over the fact that many of the considerations which led to the results in those cases do not apply to corporations, as contrasted with natural persons, and that there is even less justification for mechanically applying the doctrine to regulated utilities like PG&E.

In *Barnette,* the Court held that schoolchildren who were Jehovah's Witnesses could not be expelled for refusing to salute the flag and recite the Pledge of Allegiance, actions which were contrary to their religious beliefs. The Court emphasized that a question of individual rights was involved, and it enjoined the compulsory flag ceremony because it required "affirmation of a belief and an attitude of mind." *Id.* at 633. The Court summarized the basis for its decision with a strong endorsement of the need for government to accept and tolerate individual freedom of thought:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the

price of occasional eccentricity and abnormal attitudes. . . .

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

319 U.S. at 641-42. Plainly, those reasons have no application to corporations like PG&E.

Wooley v. Maynard, supra, is a direct descendant of *Barnette.* There, this Court was "faced with the question of whether the State may constitutionally require an *individual* to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." 430 U.S. at 713 (emphasis added). The Court began its analysis by observing that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714. It concluded that "the First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* at 715.

Since the heart of *Barnette* and *Wooley* lies in the "freedom of thought" enjoyed by "individuals," those cases do little or nothing to advance PG&E's cause. Although corporations may "speak," they certainly do not "think," nor is it apparent how they would go about exercising freedom of thought. A major foundation of our society is the recognition that there are certain matters of belief and conscience in which the government cannot properly interfere, yet because of their inanimate nature, corporations have no beliefs, feelings, or consciences of the kind protected by *Barnette* and *Wooley,* even though they may make statements and take positions through the human beings who work for them.

At first glance, *Miami Herald Publishing Co. v. Tornillo, supra,* seems more applicable to the present controversy, since there a corporation which owned a newspaper successfully challenged a

state law mandating a right of reply by certain persons who were the subject of critical articles. However, *Tornillo* in no way establishes a broad "freedom of thought" for corporations. Rather, it is a case vindicating the freedom of a newspaper to control its own editorial process, in which the Court struck down a "[g]overnmental restraint on publishing." 418 U.S. at 256. The Court held that the statute would inevitably have a chilling effect on news and commentary by pressuring editors to avoid controversy and that it was an "intrusion into the function of editors." *Id.* at 257, 258. Because *Tornillo* arose in the context of governmental regulation of newspapers, it cannot properly be read, as PG&E would have it, to establish any broad right of a non-media corporation not to speak. Rather, the decision reflects the principle that "the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned." *Id.* at 259 (White, J., concurring).

PG&E's citation of *Abood v. Detroit Board of Education, supra,* is also off the mark. Appellant finds in that case a First Amendment "right to refrain from speaking and from associating with the messages of others," PG&E Brief at 9, but it fails to recognize that *Abood* is a two-edged sword as applied to utility billing envelopes. It is undisputed that the ratepayers, not PG&E's shareholders, ultimately bear all postage costs up to one ounce. Therefore, if PG&E had a right under *Abood* to object to TURN mailings with which it disagreed, then PG&E ratepayers would unquestionably have a right to object to the PG&E newsletter *Progress* or other PG&E materials with which they disagreed. That would be true even though in each case the sponsor of the message (PG&E for *Progress* and TURN for its materials) would pay all of the additional costs resulting from the inserts. Moreover, *Abood,* no less than *Barnette* and *Wooley,* rests on the proposition "that an individual should be free to believe as he will." 431 U.S. at 235. Therefore, appellant's claim is without foundation, since no issue of individual freedom of thought is in-

volved in this case, where a corporation objects on First Amendment grounds to a regulatory program requiring it to enclose information which the PUC believes will be useful to ratepayers and to the regulatory process.

B. *The "Right Not To Speak" Is Much More Limited Than The Right To Speak.*

In addition to assuming that a corporation is entitled to the same protection for "freedom of thought" as an individual, PG&E analyzes this case as if the right to speak and the right not to speak are coextensive and require identical application in every case. PG&E in effect argues that in every situation in which it would be unconstitutional for the government to prohibit a speaker from addressing a particular topic, it would also be unconstitutional for the government to in any way require a reluctant speaker to say something he would prefer to leave unsaid or to be the conduit for the message of another, even if the statement is directly related to a lawful government regulatory program.

The flaw in PG&E's approach is apparent if one examines this Court's recent decision in *Zauderer v. Office of Disciplinary Counsel,* 105 S. Ct. 2265 (1985). The Court there struck down as unconstitutional certain prohibitions on advertising by a lawyer seeking contingent-fee cases, while at the same time upholding the constitutionality of the requirement that an attorney who advertises that no legal fees will be payable unless there is a recovery must also disclose that the client is liable for costs if the case is unsuccessful. The Court's resolution of *Zauderer* thus depended on the distinction between prohibitions, on the one hand, and required disclosure, on the other. *See, e.g., id.* at 2282 ("Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present"); *id.* ("appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal"). Similarly, the three Members of this

Court who reached the constitutional question in *Lowe v. Securities and Exchange Commission,* 53 U.S.L.W. 4705 (June 10, 1985), also expressed the view that the publisher, who could not constitutionally be prohibited from disseminating certain investment newsletters, could nonetheless be required to include facts (including even disclosure of a prior criminal conviction) which he would prefer not to publicize. *See id.* at 4717, 4719-20 (White, J., concurring in the result). Accordingly, appellant's argument is flawed because it fails to recognize this distinction, and hence it applies the wrong test in weighing the State's interest in this case against its own desire not to include consumer information about utility regulation in its billing envelopes. As we now show, when the correct test is applied, the program must be sustained.

C. *The State Reasonably Exercised Its Regulatory Power In This Instance.*

In *Zauderer,* this Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 105 S. Ct. at 2282. *See also id.* n.14. Likewise, in this case the decision made by the California PUC should be upheld so long as it is reasonably related to the State's regulation of utility rates and services, "areas that have been characteristically governed by the States." *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U.S. 190, 205 (1983).

In adopting the order challenged by PG&E, the PUC indicated that it expected the inclusion of TURN mailings four times a year for two years to improve the quality of the Commission's own fact-finding process. Not only would consumers receive additional information on utility issues, but TURN would have the opportunity to raise the funds necessary to enable it to participate more fully in Commission proceedings, which the PUC expected to enhance the record and thereby enable the Commission to do a

better job of setting rates and regulating utility services in accordance with its statutory mandate. Since the Commission's decision to grant TURN access to PG&E's billing envelopes for a two-year period followed extensive proceedings before the Commission, plus actual experience under the Commission's prior grant of similar authority to UCAN, this Court should give considerable deference to the PUC's determination as to the usefulness of permitting inclusion of the TURN flyers. Therefore, this decision should be sustained unless it directly and unnecessarily infringes on PG&E's First Amendment rights, which it does not.

In determining the reasonableness of the PUC decision challenged here, this Court should look to both the benefits which allowing TURN access to the PG&E billing envelopes is expected to bring to the Commission's regulatory program and the burden, if any, which allowing access may place on PG&E's exercise of its constitutional rights. Under all the cicumstances, the PUC's decision is clearly a proper one which is well within its authority.

A detailed discussion of the principal benefits of allowing access to TURN will be dealt with in the briefs of appellees. In that connection, there is one additional fact which, although not determinative, is surely significant—that a number of other States have independently reached the same conclusion as did the Commission concerning the benefits of promoting the representation of ratepayers through such a program. Thus, the Wisconsin statute, which *amici curiae* Wisconsin State Telephone Association, *et al.*, describe in their brief, became effective on November 29, 1979.[1] A similar Citizens Utility Board was organized pursuant to statute in Illinois, and it has been enclosing its materials in billing envelopes for a year. And, as noted above, UCAN made eight mailings in SDG&E billing envelopes over a two-year

[1] Only after this Court noted probable jurisdiction in this case did the Wisconsin State Telephone Association and Wisconsin Bell, Inc. file a lawsuit challenging the constitutionality of the statute.

period and is awaiting a decision on its request for an extension of its right of access.[2]

In addition to supporting the reasonableness of the Commission's determination that access by TURN will assist in the regulatory process, the existing programs are also important because they demonstrate that the problems which PG&E has conjured up are imaginary, not real. To be sure, there are a number of variations among these programs, including such matters as the structure of the group allowed access, the mechanics of access, and the computation of the payments to be made by the group. However, none of those has a direct bearing on this case, which presents a broad challenge to the authority of the States to permit any access as a means of improving their regulation of the service provided by utilities. But even limited examination of the actual experience in the states allowing access to billing envelopes proves that PG&E's dire predictions are without foundation.

For example, PG&E suggests that there is a likelihood that ratepayers may confuse TURN's messages with its own. PG&E Brief at 18. Not only does this contention ignore the provision in the PUC's order which requires TURN to clearly identify itself as the source of its mailings and to state that the contents have not been reviewed or endorsed by PG&E or the Commission, but it overlooks the fact that there is no evidence at all of ratepayer confusion resulting from any of UCAN's eight mailings. Moreover, even a cursory look at the Wisconsin Citizens Utility Board solicitations included in the Appendix to the Brief of Wisconsin State Telephone Association, *et al.*, makes it apparent that no ratepayer could believe that the materials emanated from a utility. WSTA Appendix at 7-a to 18-a, 22-a to 25-a. Moreover, PG&E is free to inform ratepayers that it is including

[2] Other states have adopted similar proposals which have not yet been implemented. On November 6, 1984, the voters of Oregon adopted an initiative measure which creates an independent, nonprofit public corporation which will be permitted to insert materials in utilities' billing envelopes. The New York Public Service Commission has tentatively approved access by New York CUB to the billing envelopes of certain utilities, but implementation of that order has been postponed pending the outcome of litigation in the New York courts. *See* page 2, *supra*.

an insert only because it is required to do so by law, and that it disagrees with the views expressed. *See, e.g.,* WSTA Appendix at 19-a to 20-a, 26-a to 28-a (examples of disclaimers and rebuttals by Wisconsin utilities).

PG&E also speculates that it may not be able to include *Progress* and other messages in the billing envelope in the four months each year that TURN is permitted to include its materials. PG&E Brief at 11-13. First of all, it should be noted that PG&E is completely free to include *Progress* and other messages every month, provided that it is willing to pay any additional postage charges. Moreover, experience demonstrates that it is unlikely that there will be any substantial excess postage, especially if the utility and TURN make reasonable efforts to coordinate their mailings to minimize costs. For example, UCAN has made eight mailings to SDG&E customers over the past two years, and no difficulties of the type feared by PG&E have arisen.[3] In any event, issues of cost allocation are everyday matters of regulatory law, and there is no foundation at all for PG&E's suggestion that its own communications with ratepayers will inevitably be unconstitutionally burdened because of the inclusion of TURN inserts in some months.[4]

Such technical details as how to avoid confusion by ratepayers or how to keep the TURN inserts from interfering with the dissemination of *Progress* could easily be dealt with if the actual operation of the program led to any of the problems envisioned

[3] The brief of SDG&E as *amicus curiae* in support of the jurisdictional statement in this case made no allegation that the UCAN mailings have in any way interfered with its own efforts to communicate with ratepayers or made those efforts more costly. SDG&E did not file a brief on the merits.

[4] *Amicus* American Gas Association argues that the PUC's order effects a "taking" of property without compensation. No such issue was raised in PG&E's jurisdictional statement in this Court, although it had been raised and rejected below. The California Supreme Court declined to review the PUC's ruling on the state-law issue of ownership of the extra space in the billing envelope, and the PUC's resolution of that issue is therefore binding upon this Court. *Estate of Thornton v. Caldor, Inc.,* 53 U.S.L.W. 4853, 4855 n.8 (June 26, 1985). Moreover, PG&E appears to concede that its shareholders could be required to pay the fair value of the "extra space" used by the utility for its messages. PG&E Brief at 39.

by PG&E. Perhaps realizing this, PG&E puts its main emphasis on its claimed right not to speak. But even assuming that PG&E does possess a constitutional right which is arguably affected by the order challenged here, the action taken by the PUC is plainly reasonable in light of the substantial state regulatory interests which support the program.

This Court's recent decision in *Zauderer* and the concurrence in *Lowe* establish that regulatory authorities have the power to require anyone engaged in a commercial activity, even an individual, to disclose information which may be useful to the public. The approach taken in *Zauderer* and in the *Lowe* concurrence had previously been endorsed in many other regulatory contexts. *See, e.g., Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637-38 (1980) (disclosures by charitable organizations to prevent fraud); *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 571 (1980) (advertising by a public utility); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771-72 n.24 (1976) (advertising by pharmacists); *Brooklyn Union Gas Co. v. Public Service Commission,* 101 A.D.2d 453, 458-60, 478 N.Y.S.2d 78, 82-83 (3d Dept. 1984) (upholding an order which required that any advertisement based on the price advantage of natural gas include a disclaimer stating that the advantage might be lost in the future as a result of deregulation).

The order challenged by PG&E is fully supported by these holdings, and in fact the inclusion of inserts is less intrusive by far than the compelled disclosures which this Court has approved in the past. For example, Mr. Zauderer was required to inform those reading his advertisements of their potential responsibility for costs. The other cases cited above also endorsed requirements of disclosure by the charity, utility, or business involved. PG&E, on the other hand, is merely being required to transmit, at no cost to itself, an insert in which another party is speaking, where the message presented will not be associated with PG&E and in fact will carry a statement that PG&E has not reviewed or endorsed it. In contrast, *Wooley,* the case on which PG&E principally relies, depended on the holding that a message displayed on an in-

dividual's automobile "is readily associated with its operator." 430 U.S. at 717 n.15. Here, PG&E, as a regulated utility, is free to distance itself from TURN's statements and to contradict them if it chooses to do so, just as the shopping center owners in *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 88 (1980), were "free to publicly dissociate themselves from the views of the speakers or handbillers" who came onto their property. Therefore, given the minimal burden imposed, any constitutional right not to speak which PG&E may have is not violated by the PUC order under review.

* * *

Amici wish to make one final point which grows out of those made above. The position argued for by PG&E in this case threatens a substantial constitutionalization of utility regulation if it is accepted. While *Consolidated Edison* recognized that First Amendment rights may be violated if a regulatory decision directly prohibits discussion of particular issues, *Barnette,* on which PG&E relies heavily, points out that utility regulation and individual liberties call for entirely different types of constitutional analysis:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

319 U.S. at 639.

The fatal flaw in PG&E's approach is that it would require this Court to take a constitutional doctrine which recognizes the "freedom of thought" of individuals, and mechanically apply that doctrine to a utility which does not possess the personal sensitivities and individual conscience which the doctrine is designed to protect. Plainly, many regulatory decisions have some impact

on a utility's calculations about the desirability of engaging in various kinds of speech, including advertising. However, if PG&E is successful in obtaining the wholesale importation into the field of utility regulation of the constitutional doctrines developed to protect an individual's freedom of thought, the result will inevitably be a substantial erosion of the ability of the States to regulate utilities in the manner required to protect the public.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

BRIEF AMICI CURIAE ON BEHALF OF TELECOMMUNICATIONS RESEARCH AND ACTION CENTER, WEST VIRGINIA CITIZEN ACTION GROUP AND SAFE ENERGY COMMUNICATIONS COUNSEL

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TELECOMMUNICATIONS RESEARCH AND ACTION CENTER

WEST VIRGINIA CITIZEN ACTION GROUP

AND

SAFE ENERGY COMMUNICATIONS COUNCIL

STATEMENT OF INTEREST

Amici represent the interests of telephone and energy utility consumers who are entitled to exposure to as much information as possible on matters of public import, and whose participation as consumers in the marketplace for goods and services, and citizens in the marketplace of ideas, is only as meaningful as the quality and quantity of information available to them.*

The need for informed debate on matters relating to the service of regulated utilities has magnified considerably over the last decade. Energy cost is now a significant budget item for most American families, and has become a major public policy issue. Questions about the

*Amici have submitted to the Court letters from counsel for each of the parties consenting to the filing of this brief.

price and kind of fuel used by electrical and gas utilities have even become intertwined with fundamental foreign policy considerations. Environmental quality issues have created additional, and sometimes contradictory, pressures on the energy distribution system.

Even more dramatic has been the total restructuring of our nation's telephone system, and its impact on consumers. It is no exaggeration to state that there is mass confusion over current telephone service. Customer bills bear little resemblance to those of only a few months ago. Ill-understood new charges have been imposed. The separation between local and long distance service, the forced choice from among a new array of

competing long distance carriers,** and the dramatic change from leased consumer equipment to customer-owned telephones and wiring has stupefied the American public. Consumers desperately need information, both to make decisions in the newly competitive marketplace for telecommunications services, and to express informed opinions about the public policy issues arising from this telecommunications "revolution."***

Amici, whose specific interests are

**Large segments of the public have apparently misunderstood the requirement that they must now select from among several competing long distance carriers. Because so few (about 30%) have made these choices when first called upon to do so, the FCC only recently had to direct local telephone companies to assign such consumers to particular suppliers. Investigation of Access and Divestiture Related Tariffs, FCC 85-295 (June 12, 1985).

***In this new environment, local telephone companies are often in an adverse posture to other businesses seeking to offer similar or competing services. Thus, unique access to consumers on such regulatory issues affords a significant commercial advantage as well.

stated below, are concerned that the public must be able to receive diverse viewpoints on these and other increasingly controversial and important issues related to telephone and energy utility rates and services.

Telecommunications Research and Action Center (TRAC)(formerly known as National Citizens Committee for Broadcasting) is a non-profit organization of 10,000 individuals and organizations. TRAC has helped establish a national telephone "hotline", and published books and posters to assist telephone consumers to participate effectively in the marketplace for services. As a participant in the regulatory and legislative process, and as a consumer newsletter publisher, it also seeks to assist the public by advocating specific regulatory policies promoting maximal public participation in these decisions. TRAC brings an addi-

tional, unique perspective to this case, since it represents consumer interests not only in telephone utility rate and service matters, but also in issues related to insuring that broadcasting and other electronic mass media provide opportunities for opposing viewpoints on controversial issues of public importance. As discussed in the Argument below, TRAC and other amici believe that the "extra space" in utility bill envelopes and the broadcast spectrum are both "scarce" or limited resources for the dissemination of ideas. Amici believe that such resources should not be monopolized by a single entity, whether it be a regulated utility or a licensed broadcaster.

Safe Energy Communications Council (SECC) is a five year old non-profit coalition of environmental, energy and media organizations. SECC was established because vast one-sided public relations

and advertising expenditures by utility and other energy providers left an imbalance in information available to consumers on the economic and environmental impact of energy policies. SECC has attempted to insure that ratepayers not be forced to subsidize such public relations expenditures, and has employed the fairness doctrine to make sure that the public is exposed to opposing points of view in broadcast coverage of utility issues.

West Virginia Citizen Action Group (WVCAG) is a private non-profit corporation, organized in 1975 for the general purpose of research, education and advocacy on public policy issues affecting citizens of West Virginia. WVCAG has focused on electric utility rate and service issues throughout its existence, by intervening in rate cases before the West Virginia Public Service Commis-

sion, conducting educational programs for citizens on utility rate issues, and advocating policy changes regarding rates in legislative, administrative, and judicial forums.

WVCAG is particularly concerned with the use of utility bill inserts by utility companies to express only one side of issues of public import. In March 1982, Appalachian Power Company (APCO), which provides electric power to West Virginia, enclosed with its bills a pamphlet urging customers to lobby the U.S. Congress on pending legislation. WVCAG, in conjunction with the National and West Virginia Wildlife Federations, and the Coalition of American Electric Consumers, asked APCO for an opportunity to present, in the bill envelope, an opposing view. APCO refused, and WVCAG petitioned the West Virginia PSC for relief. The PSC dismissed the petition, claiming a lack of jurisdiction

under West Virginia law. The Supreme Court of Appeals of West Virginia recently reversed the PSC ruling, holding that the PSC may order a response within the bill envelope, consistent with both state law and the First Amendment. West Virginia Citizen Action Group, et al. v. Public Service Commission, No. 16512 (W.Va. May 30, 1985).

SUMMARY OF ARGUMENT

For many years, Pacific Gas and Electric (PG&E) unilaterally utilized otherwise unused, postage paid, space in its billing envelopes to propagandize its customers. It paid nothing for the exclusive use of the customer mailing list, or for postage.

The determination of the California Public Utilities Commission (PUC) that this extra space, not needed for invoices or other official purposes, is ratepayer

property is not at issue here. Nor is it disputed that the right to use the space has economic value. What has been challenged is the PUC's determination that ratepayers' interests are best served by permitting others, as well as PG&E, access to that space to present information on issues of interest to consumers.

This case is entirely different from Consolidated Edison v, Public Service Commission, 447 U.S. 530 (1980), where this Court invalidated a flat ban on all discussion of controversial issues in utility bill stuffers. No one, certainly not PG&E, has been restricted from speaking on any issue, at any time. Moreover, in Consolidated Edison, there was no finding as to the ownership of the extra space.

The PUC's decision here is firmly rooted in established First Amendment jurisprudence. Actions which promote the

free-flowing marketplace of ideas in our democracy contribute to the development of a better informed electorate. By insuring that this valuable and scarce ratepayer property is used to discuss contrasting views on issues of import, the PUC has advanced the First Amendment right of the public "to receive suitable access to social, political, esthetic and other ideas." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

PG&E wrongly places reliance on Miami Herald v. Tornillo, 418 U.S. 241 (1974) to contend that its constitutional rights have been impaired. The content, length and layout of PG&E's pamphlets, as well as its freedom to insert them in the utility bills, is unaffected by the PUC's decision. There is instead a close resemblance here to the fairness doctrine in broadcasting, which has been unanimously upheld by this Court. Red Lion, supra.

Nor is PG&E correct in claiming that it has been forced to endorse the views of its opponents. The PUC carefully insulated PG&E from being identified with bill inserts prepared by others, and PG&E remains free to include rebuttal messages of its own. This, combined with the fact that the extra space does not even belong to PG&E makes this case even more clear than that of PruneYard Shopping Center v. Robins, 447 U.S. 75 (1980), where similar arguments were rejected.

ARGUMENT

I. THE REQUIREMENT THAT UTILITIES MUST SHARE ACCESS TO THE EXTRA SPACE IN BILLING ENVELOPES, THE POSTAGE FOR WHICH IS PAID BY RATEPAYERS, PROMOTES THE FIRST AMENDMENT GOAL OF A ROBUST, UNINHIBITED, AND WIDE-OPEN MARKETPLACE OF IDEAS.

In this case, a state regulatory commission has precluded a single regulated entity from arrogating -- to its own exclusive use -- a limited, publicly owned, channel of communication. The ruling under review is correctly based on an established First Amendment objective: that the proper role of government is to promote a free-flowing marketplace of ideas, thereby enabling the citizenry to make better informed decisions on issues of public importance.

In similar circumstances, this Court unanimously upheld the constitutionality of the fairness doctrine of the Communications Act of 1934, as amended. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367

(1969). The fairness doctrine is based on the principle that because broadcasters have an exclusive government license to use a limited, or "scarce," means of communications for the benefit of the public, the licensing authority can properly require the presentation of contrasting viewpoints on controversial issues of public importance.

Here, the California Public Utilities Commission (PUC) ruled that Pacific Gas & Electric Co. (PG&E) may not monopolize access to the "extra space" in monthly bill envelopes, the postage for which is paid by ratepayers, not PG&E shareholders. The PUC held in a prior ruling[1] not disputed here, that the extra space is a valuable limited resource for the dissemination of ideas in which the ratepaying public holds an equitable

[1]Decision 93887. See PUC Motion to Dismiss at 8, A-33.

property interest. Unlike the situation in Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) (hereinafter "Con. Ed."), where this Court rejected a flat ban on use of the billing envelope for controversial messages, the PUC ruling in no way restricts the utility's rights to express its views. Rather, as in Red Lion, the PUC ruling insures that the public receives more, not less, information upon which to evaluate important questions of public policy.

Broadcasting, the subject of Red Lion, and the extra space in utility bill envelopes, the issue here, share a relevant characteristic. There is in both instances the danger of monopolization of a limited or scarce publicly owned means of communicating ideas. Just as only one person may use a particular broadcasting frequency at a given time, the extra space in the bill envelope is the only avenue

for reaching the universe of utility ratepayers through the mail without paying for postage. Prior to the PUC ruling, only PG&E was able to take advantage of the "free ride" in the bill envelope to disseminate its viewpoints. As a result, the ratepaying public received only PG&E's views, to the detriment of the "profound national commitment that debate on public issues should be uninhibited, robust and wide-open." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

A. The PUC's Action Promotes Speech And Therefore Is Consistent With The First Amendment

The First Amendment prohibits government from limiting speech on issues of public importance. However, the First Amendment does not prevent, but in fact encourages, government actions to promote more diverse speech, or to insure that public debate occurs in an orderly and

fair manner.[2] In furtherance of these goals, content-neutral rules to structure debate have been approved as advancing core objectives of the First Amendment. For example, this Court long ago endorsed steps to prevent the monopolization of ownership of various means of communication, stating: "It would be strange indeed...if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." Associated

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[2]See Con. Ed., 447 U.S. at 546 (Stevens, J., concurring).

Press v. U.S., 326 U.S. 1, 20 (1945).[3]

An obvious, well-accepted corollary is that, if a means of communication is necessarily limited, as are broadcast frequencies, those granted the exclusive right to use such means of communication may be expected to employ them to present contrasting viewpoints on controversial issues of public importance. This Court, unanimously upholding such a requirement as embodied in broadcasting's fairness doctrine, stated:

> It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee.

[3]In First National Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978), this Court invalidated a ban on certain types of corporate speech, but stated:

> If [the government's] arguments were supported by findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367.

Red Lion, supra, 395 U.S. at 390. See also CBS, Inc. v. FCC, 453 U.S. 367 (1981). As it has stated more recently, the "thrust of restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern." FCC v, League of Women Voters, 104 S. Ct. 3106, 3118 (1984).

In this case, the California PUC has acted to prevent the monopolization of a means of communication in which the ratepaying public has an equitable property interest. As with the fairness doctrine, the goal is to create an informed public by promoting, rather than inhibiting, speech. It is the public's right "to receive suitable access to social, political, esthetic, and other

ideas," Red Lion, supra, 395 U.S. at 390, which is thereby enhanced.[4]

B. The Extra Space in Billing Envelopes Is A Limited Scarce Resource Previously Monopolized By PG&E

The utility bill envelope is the only means of reaching all ratepayers through the mails free of postage charges. The postage for the entire envelope has already been paid by the ratepayers.

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[4]Protection for corporate political speech is not principally for the corporation or its owners, but is rooted in the benefits such expression has for creating a well-informed public, Con. Ed., 447 U.S. at 534. This Court has invariably reviewed restrictions on corporate speech in terms of their impact upon the marketplace of ideas. First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); id., at 810 (White, J., dissenting). Indeed, as noted in Bellotti, id. at 783, the analysis is the same even for corporate commercial speech:

> A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of information." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 764 (1976). See Lindmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 95 (1977).

Thus, when the utility uses the envelope to address one side of a debate on public issues, it receives a "free ride" within the "extra space" in the envelope not used by the bill itself. Indeed, even if the utility agreed to pay a proportion of the postage, it would still receive a subsidy, to the extent that its cost would be less than a separate mailing.[5]

The California PUC ruling under review requires that access to this valuable resource not be monopolized by the utility. Absent the PUC ruling, ratepayers or their representatives who

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[5]As Justices Blackmun and Rehnquist noted in dissent in Con. Ed., 447 U.S. at 554:

> The Commission is obviously correct that the utility will obtain a partial free ride for its message even if the shareholders are charged with part of the mailing costs in addition to the costs attributable to the inserts. Consumers would still be forced to aid in the dissemination of the utility's distribution costs less than they otherwise would be.

hold views different from the utility company, and who wish to provide information to ratepayers, would be forced to pay the postage for separate mailings. Therefore, just as broadcasters must offer contrasting viewpoints over the "scarce" broadcast frequency under their control, so may a utility be required to allow alternative viewpoints to be presented in the bill envelope's extra space.

The fact that the California PUC has held that the "extra space" in the bill envelope is the equitable property of the ratepayers who have paid for the postage is a material distinction from Con. Ed.. In Con. Ed., ownership of the extra space in the envelope was not at issue. In that context, this Court declined to draw an analogy with broadcasting, stating that the flat ban there under review could not be justified on similar ground. It stated that "[n]o person can broadcast without a

license, whereas all persons are free to send correspondence to private homes through the mails." 447 U.S. at 530.

The California PUC has followed a different course than did its counterpart in New York. Focussing upon the contents of the billing envelope as ratepayer property, it did not restrict its use for political discussion, but rather, set out to insure that it was used optimally for that purpose.

Based upon the finding that the free or subsidized access to the extra space is a scarce commodity of value, the PUC's action does, in fact, resemble broadcast

regulation.[6] In these circumstances, the extra space in a bill envelope is a unique resource which cannot be substituted by general access to the mails. The ability to include a message in the bill envelope, regardless of who pays for the postage, brings special advantages which cannot be duplicated in a separate mailing. A utility bill envelope is not merely another piece of mail for most recipients. Virtually all ratepayers open and investigate at least superficially the contents of their utility bill envelope. Thus, those using the envelope to express their viewpoints are reaching a "captive

[6]The flat ban attempted in Con. Ed. ran afoul of the failure to account for the alternative of permitting more, rather than less, speech. Thus, the New York Public Service "Commission ha[d] not shown ... that the presence of bill inserts ... would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope." 447 U.S. at 530. Here, the California PUC has embraced the opportunity to direct that contrasting viewpoints be made available.

audience." A separate mailing may be treated as "junk mail" and thus, as PG&E concedes in its Brief, at 14, n.11, has a decreased probability of being read or even opened. See also PUC Motion to Dismiss at A-4, n.2.

The utility envelope is also the most efficient means of providing ratepayers with information on issues of particular concern to them.[7] The utility bill is sent to all ratepayers, and only to ratepayers. Without access to PG&E's customer list, those using a separate mailing can only guess which postal

[7]In similar circumstances, long-standing Securities and Exchange Commission regulations require corporate management to include statements by dissident shareholder groups in proxy materials mailed to shareholders. 17 C.F.R. §§240.14a-8, 240.14a-11. Just as management acts as a "fiduciary" for shareholders, and must therefore provide them with information from diverse sources, utilities are trustees or fiduciaries over the extra space in bill envelopes, which is the equitable property of ratepayers. Utilities may, therefore, be required to abide by obligations intended to provide ratepayers with contrasting viewpoints on issues of public importance.

addressees are in fact ratepayers, leading to underinclusive or overinclusive mailings.[8]

For these reasons, the utility bill envelope is a unique and valuable medium which cannot be duplicated by other methods. Only the bill envelope offers essentially free postage through the use of the "extra space" and only the bill envelope will reach and be opened by all ratepayers. Utilities should not be permitted to monopolize this valuable resource.

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[8]Not all postal addressees in a particular area are ratepayers to certain utilities. For example, many apartment and condominium dwellers do not pay for utility service directly. Indeed, absentee landlords who are ratepayers may live in different communities and could be reached by mail only through the utility bill mailing list. Therefore, use of the general mails to reach ratepayers is not a substitute for use of the extra space in the bill envelope.

II. THE RATIONALE AND HOLDING OF MIAMI HERALD v. TORNILLO DO NOT APPLY TO THIS CASE

PG&E argues that this Court's ruling in Miami Herald v. Tornillo, 418 U.S. 241 (1974), supports the position that the California PUC may not permit others to have access to the billing envelope. In Tornillo, this Court invalidated a Florida statute requiring that a newspaper which attacks a political candidate in its own pages must offer to print a reply. The Court ruled that a newspaper could not be compelled to print the views of another in its publication. However,the Tornillo analogy is misplaced.

PG&E is not being forced to include anything in the "publication" -- known as Progress -- which it has long inserted into the extra space of the bill envelope. It retains full editorial discretion over Progress. PG&E may say whatever it wishes, without limitation as to content

or length. In addition, this case resembles, and is governed by, Red Lion, not Tornillo. The extra space in the billing envelope, unlike a newspaper, but similar to a broadcast frequency, is a scarce and limited public resource properly subject to measures intended to insure that the public receives information on important public issues.

A. PG&E'S Ability To Say Or Print Whatever It Wishes In The Bill Envelope Has Not Been Infringed

In stark contrast to the Florida statute overruled in Tornillo, the PUC ruling in no way restricts the content, length or layout of stories or commentaries contained within PG&E's newsletter. The effect of this ruling is not to force PG&E to make particular statements. It can speak out on any issue or refrain from such speech as it sees fit, in complete accord with this Court's rulings in Con. Ed. and Tornillo.

Most significantly, the statute condemned in Tornillo imposed a requirement that publishers be compelled to print within their newspapers, at their own expense, statutorily mandated replies. In contrast, PG&E is here not being compelled to print anything; it need not give up any editorial space or bear the cost of printing of TURN's opinions. The design and effect of the PUC ruling is to require only that PG&E provide TURN with access to a small portion of the excess, ratepayer owned, unused space in the envelope. It is space which PG&E had previously appropriated, without authority, for its

own use, at no cost to the company.[9]

Tornillo invalidated a dictate that newspapers modify their internal editorial processes. Thus, it was held that the relevant "statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." 418 U.S. at 258. There is no such intrusion into Progress' editorial processes. Progress' editors remain absolutely free to choose what material is included in, or deleted from, the paper. Therefore, the factors which led to the

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[9]PG&E also contends that the PUC ruling infringes upon its right to free speech, because the ruling would allegedly prevent it from inserting its newsletter into the bill envelope during months designated for TURN's access. This claim is without merit. Nothing the PUC has done precludes PG&E from including Progress or anything else in the bill envelope, even in those months during which TURN has been granted access. See TURN, et al. Motion to Dismiss, at 7-8. Even assuming that there may times when Progress may not fit into the extra space, PG&E would, at most, be forced to pay the extra postage necessary to add its material into the envelope, rather than take a "free ride" in the extra space paid for by ratepayers.

Tornillo ruling simply are not present here.

B. The Proper Analogy Is To Broadcasting, Not Newspapers

Tornillo is irrelevant to this case not only because there are no restrictions on PG&E's editorial discretion, but also because newspapers and the print media may not be properly analogized to the extra space in bill envelopes. Rather, as discussed supra, the extra space in the utility bill envelope is analogous to a broadcast frequency because it is a limited or scarce resource, with economic value, for the dissemination of ideas. As this Court recently reiterated in FCC v. League of Women Voters, 104 S.Ct. 3106, 3116 (1984), broadcasting is treated differently from the print media because of the scarcity of broadcast frequencies relative to the number of individuals who want to broadcast. The extra space in

the utility bill envelope, which is the equitable property of ratepayers, is due the same constitutional treatment.

To be sure, government may not force those controlling a means of communication to present the views of others where access to that means of communication is unlimited. Such is the case of the print media, as demonstrated in Tornillo. Anyone can start a newspaper or similar print publication. In contrast, government is permitted to require those controlling limited or "scarce" means of communication, such as broadcasting, to provide contrasting viewpoints on controversial issues of public importance. As this Court stated in Red Lion, "there are substantially more individuals who want to broadcast than there are frequencies to

allocate...." 395 U.S. at 388.[10]

The extra space in a bill envelope closely resembles the broadcast spectrum, but not newspapers. Absent the PUC's action, only PG&E was able to take advantage of the extra space in the bill envelope and reach all ratepayers without paying for postage. The extra space is a resource owned by ratepayers, but monopolized by the utility. In a similar manner, the airwaves are owned by the public, but controlled by broadcasters

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[10]This "scarcity" of broadcast frequencies persists. The best indication that demand for broadcast licenses outstrips supply is found in ever escalating prices paid for existing TV and radio stations, which far exceed the fair market value of the stations' physical property and good will. See "The New Bonanza in Broadcasting," Broadcasting Magazine, Apr. 15, 1985, at 43-45. On those rare occasions when new broadcasting allocations are made available, competing applications abound; some 160 were filed for 13 major market TV and radio authorizations. "Nearly 20 Years of Trouble for RKO," Broadcasting Magazine, Oct. 22, 1984, at 40. The FCC received an estimated 32,000 applications for 4,000 newly created low power TV broadcast service licenses. "Low Power Television," Broadcasting Magazine, July 2, 1984, at 81.

who, as a result, must share their frequencies. Thus, Red Lion, not Tornillo, is on point.

III. REQUIRING PG&E TO ALLOW OTHERS TO USE THE EXTRA SPACE IN BILLING ENVELOPES DOES NOT VIOLATE ANY OF ITS CONSTITUTIONAL RIGHTS

PG&E relies heavily on Wooley v. Maynard, 430 U.S. 705 (1977), which held that compelling New Hampshire motorists to display the state's motto, "Live Free or Die," on their license plates violated their First Amendment rights because it forced them to carry a message specified by the state which may be offensive to their religious views. PG&E argues that, under Wooley, it may not be forced to include the views of another entity in the billing envelope. However, PG&E disregards a subsequent case, PruneYard Shopping Center v. Robins, 447 U.S. 75 (1980), which decisively establishes that the circumstances here are entirely

different from those in Wooley.

In PruneYard, this Court ruled that the free speech clause of the California state constitution, interpreted by the California Supreme Court as permitting political solicitation in a privately-owned shopping center, did not violate the shopping center owner's rights under the First and Fourteenth Amendments to the U.S. Constitution. The Court expressly distinguished the case from Wooley because 1) the views of the pamphleteers were not likely to be identified with the views of the owner; 2) the state was not requiring that a specific message be disseminated; and 3) the owner was free to disassociate himself from the views of the speakers. Id. at 85-88. The same factors are present in this case, indeed much more clearly so than in PruneYard.

First, the California PUC has

mandated that TURN shall clearly identify itself as the source of all material inserted into the envelope and state that its contents have been neither reviewed nor endorsed by PG&E or the PUC. See, PUC Motion to Dismiss at A-38. Thus, there is no danger that those reading the material in their bill envelope will misidentify PG&E as the source of TURN's inserts. Second, the PUC has in no way required that a specific message be disseminated. Third, the PUC is not only free to disassociate itself from the TURN statement; it can also include rebuttals and/or notices of disclaimer within the envelope. The Wooley precedent does not apply here for the same reasons, therefore, that it did not apply to the shopping center in PruneYard.

PG&E grievously misinterprets PruneYard in attempting to distinguish it from the facts in this case. As discussed

above, the key difference between PruneYard and Wooley is that the views of pamphleteers would not be misidentified as being those of the shopping center owner, while misidentification of views was clearly a danger associated with the New Hampshire license plate slogan. One factor of several cited in PruneYard which led the Court to distinguish Wooley is that the shopping center owner had chosen to make it open to the public.[11]

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[11]The Court distinguished Wooley, stating:

> Here, by contrast, there are a number of distinguishing factors. Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property ... Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.

Because it was known that the shopping center was open to all, shoppers would not assume that those handing out political information in the center were endorsed by the center's owner.

PG&E argues incorrectly that because it has chosen not to open the bill envelope to the public, PruneYard does not apply. First, the analogy is inapposite because PG&E does not own the extra space in the envelope; it is the equitable property of ratepayers. It is not for PG&E to choose whether the extra space will be open or closed to the public.

Second, the fact in PruneYard that the shopping center was open to the public was, as discussed above, evidence merely that the pamphleteers' views would not be confused with those of the owner. In this case, there is other, and actually

stronger, evidence that misidentification will not occur. Here, the source of the item distributed must be clearly identified.

CONCLUSION

For the reasons stated above, amici respectfully urge that the ruling of the California PUC be upheld by this Court.

Respectfully submitted,

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OCTOBER TERM, 1985

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

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Appellees.

On Appeal From the Supreme Court of California

BRIEF OF AMICUS CURIAE THE LEGAL AID SOCIETY OF NEW YORK CITY IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE

The Legal Aid Society of New York City is a private non-profit organization incorporated under the laws of the State of New York for the purpose of rendering free legal representation and assistance to persons in New York City who are without adequate means to employ other counsel. It has been cited by this Court as perhaps "the oldest formally organized legal aid society in the United States," and as enjoying a "wide reputation for the devotion of its staff and the quality of its service." Blum v. Stenson, ___ U.S. ___, 104 S.Ct. 1541, 1544 n.3 (1984).

The Civil Division of The Legal Aid Society has appeared before this Court on numerous occasions representing parties or as amicus curiae in civil cases raising a wide variety of constitutional and statu-

tory issues.[1]

This case concerns the power of a state public utility commission to adopt measures intended to educate utility customers about utility policy issues, thereby enhancing informed participation in the regulatory process. The Legal Aid Society has been actively involved in proceedings before the New York State Public Service Commission ("PSC") to ensure that the interests of the poor are adequately considered in ratemaking and other utility decisions. In particular, we successfully advocated that the PSC adopt a measure similar to the California order at issue in

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1 See, e.g., Blum v. Stenson, ___ U.S. ___, 104 S.Ct. 1541 (1984); Yaretsky v. Blum, 457 U.S. 991 (1982); Caban v. Mohammed, 441 U.S. 380 (1979) (amicus); Lalli v. Lalli, 439 U.S. 259 (1978) (amicus); United States v. Kras, 409 U.S. 434 (1973).

this case. The Court's resolution of this case may thus materially affect the ability of amicus to vindicate the interests of the poor in utility regulatory proceedings.

Letters from the parties consenting to the filing of this brief are being separately lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

The order of the California Public Utilities Commission ("CPUC") at issue in this case is a carefully considered agency action designed to widen the flow of information to utility ratepayers, expand their participation in regulatory proceedings, promote the accuracy of commission fact-finding, and thereby enhance the calibre of CPUC decision-making, without infringing on the First Amendment rights of regulated

public utilities.

The CPUC has plenary authority to regulate public utilities throughout the state of California. As this Court observed in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 569 (1980), a "[s]tate's concern that [utility] rates be fair and efficient represents a clear and substantial governmental interest." The CPUC found, in the decision below, that "'[t]here is no question that participation by representatives of consumer groups tends to enhance'" commission decision-making. (A. 19).[2]

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2 "A" refers to Appendix A to the Motion to Dismiss of Appellee, the Public Utilities Commission of the State of California, setting forth a conformed copy of the order at issue in this case, Decision No. 83-12-047 (December 20, 1983), as modified by Decision No. 84-05-039 (May 2, 1984).

Effective participation is, in turn, contingent on broader consumer awareness of regulatory policy issues, and requires the establishment of regular channels of communication between consumers and the groups seeking to represent them in regulatory proceedings.

In order to facilitate fair and efficient utility regulation, the order below requires appellant Pacific Gas & Electric Company ("PG&E") to give Toward Utility Rate Normalization ("TURN"), a California consumer group representing utility customers, access to the "extra space" in the PG&E monthly billing envelope four times each year over a two-year period. By so doing, the CPUC will provide PG&E customers with a vital opportunity to receive information enabling them to become edu-

cated about utility issues, while at the same time expand lines of communication among regulators, public utilities and ratepayers. Under these circumstances, the CPUC could apply its administrative expertise and reasonably conclude that granting TURN's request for access to the extra space in the billing envelope sent to PG&E customers would improve utility regulation in California.

While the billing envelope access order is likely to improve regulatory oversight by increasing informed participation in CPUC proceedings, it does not infringe on PG&E's freedom of speech.

First, unlike the statutes or regulations invalidated in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), Consolidated Edison Co. v. Public Service

Commission, 447 U.S. 530 (1980), and Central Hudson Gas, supra, 447 U.S. at 557, the CPUC order does not curtail PG&E's freedom to speak on any subject at any time. The CPUC order is entirely content-neutral. It does not purport to restrict PG&E's freedom to take any position on any issue. To the contrary, PG&E may utilize the entire contents of the monthly billing envelope to transmit its own material eight out of twelve times each year. Even in the remaining four months, PG&E's right to speak is not significantly abridged. Indeed, PG&E can continue to transmit its message to ratepayers, either under separate cover or even in the monthly billing envelope, provided that it use a larger envelope and absorb the additional mailing costs.

Second, PG&E will not be forced to associate with TURN's message. The CPUC order requires that the TURN material clearly disclaim any review or endorsement by PG&E. Given TURN's position on utility issues, there is little danger that the recipient of the billing envelope will treat TURN's message as if it reflected the views of PG&E.

Finally, the CPUC order may not be seen as attempting to create a public right of access to a private publication. Under California law, the extra space in the billing envelope is the property of the ratepayers, not of PG&E -- a reasonable determination since PG&E's billing costs are entirely paid for by the ratepayers.

The CPUC order, thus, does not compel PG&E to use its privately-owned property to

publish the views of another. Rather, the order simply regulates ratepayer use of ratepayer-owned property in order to enhance the diversity of views presented to PG&E customers, and is consistent with the CPUC's longstanding practice of requiring utilities to carry public service notices in the billing envelope. Far from infringing PG&E's freedom of speech, the CPUC order vindicates the First Amendment interest of PG&E's ratepayers by providing them with more information and enabling them to participate knowledgeably in the regulatory process.

ARGUMENT

I. THE COMMISSION'S ORDER CONSTITUTES A VALID AND APPROPRIATE EXERCISE OF STATE AUTHORITY TO ENHANCE REGULATORY OVERSIGHT OF PUBLIC UTILITIES

Under California law, the CPUC has

plenary authority to regulate public utilities, including the development of procedures designed to improve the quality of commission decision-making and to facilitate consumer participation in the regulatory process. Cal. Const. art. XII, §§5, 6; Cal. Pub. Util. Code §701. The CPUC order giving TURN periodic access to the extra space in the billing envelope must therefore be seen as part of a regulatory program to enhance the quality of CPUC decision-making.

Both the CPUC and the California Supreme Court have repeatedly affirmed that participation by representatives of consumer groups improves the calibre of CPUC determinations. As the California Supreme Court noted in Consumers Lobby Against Monopolies v. Public Utilities Commission,

25 Cal.3d 891, 908, 603 P.2d 41, 51, 160 Cal.Rptr. 124, 134 (1979), reh. den. (1980), the CPUC "staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing or judicial review of Commission decisions [citations omitted]." The CPUC agreed, in the decision below, that "if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in [commission] proceedings." (A.20). It is essential, therefore, that ratepayer organizations, such as TURN, provide utility consumers with critical representation in CPUC regulatory proceedings.

Merely granting organizations like

TURN the right to participate in commission proceedings, however, will do little to increase effective representation of residential and small business customers. Most consumers have little knowledge or understanding of utility policy issues. The poor, in particular, are typically less sophisticated, less educated, and less inclined to acquire the kinds of information necessary to adopt a long-term consumerist perspective. Lack of information forecloses consumers from recognizing, let alone asserting, their interests in the regulatory process. The scant information that they do receive is generally provided by the utilities themselves and, thus, will inevitably be biased in favor of the utilities' positions.

Moreover, even those consumers who

have an informed point of view on regulatory matters are frequently without a regular means by which to express their views to their representatives; they do not know how to reach their representatives; indeed, they may not even know that organizations speaking on their behalf exist. Without consumer education and regular lines of communication between consumer organizations and their constituents, the potential benefits of increased representation are likely to be stunted.

The CPUC "extra space" order should go far to mitigate these problems and to realize the possible benefits of consumer participation in favor of improved CPUC decision-making. By permitting TURN to use the billing envelope four months out of every twelve, the CPUC order will expose

ratepayers to at least a second point of view. Customers who have regularly heard -- and will continue to hear -- PG&E's positions on disputed issues of utility regulation will now also be able to receive additional information and be exposed to the divergent opinions of consumer organizations.

The likely clash of views over such important questions as utility rate structures, profits and investments, the siting of new plants, conservation incentives, and the use of nuclear power can be expected to contribute to the education of utility customers and thus stimulate their participation in the resolution of these public policy issues. Unlike the Public Service Commission order banning utility promotional advertising at issue in

Central Hudson Gas, the CPUC order here increases "the information available for consumer decisions" and thereby vindicates "the purpose of the First Amendment." 447 U.S. at 567. Opening up the billing envelope to consumer organizations in this manner therefore expands the "marketplace of ideas" to include utility policy. Cf. Consolidated Edison, supra, 447 U.S. at 537-38.

At the same time, the CPUC order will enhance the quality of representation that consumers receive from organizations acting in their name. On reading the TURN inserts, many consumers will learn for the first time of the existence of these representatives and how to communicate with them. Consumers will be encouraged to transmit their views to consumer organiza-

tions, thereby increasing the likelihood that consumers' actual beliefs are reflected in the positions taken in their name before the utility regulators. In this way, the extra access order will contribute to the representativeness of the consumer representatives.

By the same token, the billing envelope access order will contribute to the financial ability of consumer organizations to provide effective representation to ratepayers. While the CPUC provides TURN and other organizations with opportunities for compensation for participation in CPUC proceedings, the CPUC found that TURN cannot participate in all proceedings affecting PG&E ratepayers without incurring "significant financial hardship." (A. 19). By giving TURN access to the billing envelope and thereby permitting TURN to solicit donations from PG&E customers, the CPUC order will help put TURN on a sound financial basis and thus improve TURN'S ability to represent ratepayers effectively in all CPUC proceedings.

Moreover, obtaining substantial donations and statements of support will validate TURN's claims to be representative of substantial numbers of PG&E ratepayers. Conversely, the refusal of customers to contribute money, or their rejection of TURN's positions -- positions of which they would have been unaware and hence unable to reject but for the billing envelope program -- will undercut TURN's claim to be an appropriate consumer representative. In short, giving ratepayers the opportunity to support, or withhold support, from consumer

representatives will contribute greatly to the effectiveness and legitimacy of ratepayer representation before the commission.

Using the extra space in the billing envelope is, moreover, the most appropriate way to secure for the CPUC the benefits of both consumer education and of increased support for consumer representatives. For most ratepayers, particularly the poor, the working class, and those without a college education, the sole point of contact with the regulatory system is the monthly bill that they receive from a utility company. Statements contained in the billing envelope are far more likely to be seen, read and attended to than are alternative modes of communication. Indeed, PG&E implicitly recognizes this fact by trying to retain the billing envelope as its sole preserve --

even though, under California law, the extra space belongs to the ratepayers. Not only is a billing envelope insert the form of communication most likely to be seen and read, but also the insert constitutes the most cost-effective mechanism to reach, on a regular basis, large numbers of consumers scattered thoughout as large a state as California.

The terms of the CPUC order are closely geared to enhancing the public utility regulatory process. Funds that TURN receives from the bill insert process are to be "used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E." (A. 23). TURN will be required "to establish an adequate mechanism to account for the receipt and disbursal of [all] funds" so received. (A.

23). Finally, TURN will be obligated to prepare and distribute an annual report to all PG&E contributors describing TURN's activities on their behalf before the Commission. (A.23).

In issuing its order, the CPUC thus properly determined that giving TURN periodic access to the billing envelope "will help assure the fullest possible participation in [commission] proceedings" by enhancing the record in CPUC proceedings and complementing the efforts of Commission staff. (A. 19-20). As this Court held in Central Hudson Gas, a "[s]tate's concern that rates be fair and efficient represents a clear and substantial governmental interest." 447 U.S. at 569. Enhanced regulatory oversight will undoubtedly contribute to the issuance of fair and efficient

rates and to the adoption of improved regulatory policy generally. Under these circumstances, the CPUC order must be seen as constituting an appropriate exercise of agency expertise to expand ratepayer participation in agency decision-making and to improve the calibre of agency determinations.

II. THE COMMISSION'S ORDER DOES NOT INFRINGE ON PACIFIC GAS & ELECTRIC'S FIRST AMENDMENT RIGHTS

Pacific Gas & Electric contends that the CPUC's billing envelope access order violates the utility's freedom of speech. Despite the variety of arguments that PG&E marshalls in support of this contention, it is apparent that the order does not infringe on the utility's rights; rather, it vindicates the First Amendment interest of the utility's ratepayers.

PG&E relies heavily on this Court's decision invalidating orders promulgated by the New York State Public Service Commission ("PSC") concerning billing envelopes in Consolidated Edison, supra, 447 U.S. at 530, and Central Hudson Gas, supra, 447 U.S. at 557, but those orders are strikingly different from the order in question in this case. Those PSC orders sought to prohibit the utilities from using billing envelopes to communicate with ratepayers on certain subjects. They were, thus, constitutionally suspect as content-regulation and as absolute restrictions on speech.

In the present case, by contrast, the CPUC order is utterly content-neutral. There is no attempt to limit PG&E's ability to communicate with its customers either on

particular issues or in general. The CPUC decision below states that no controls are placed "on the content" of Progress, PG&E's billing insert, (A.11), and the order mandates that both PG&E and TURN "shall each determine the content of its own material." (A. 38). There is no attempt here to prohibit PG&E from speaking on any subject.

Nor does the CPUC order significantly curtail the quantity of PG&E's communication with its ratepayers. For eight out of twelve months each year, PG&E has complete control over the extra space in the billing envelopes; it may include Progress or presumably any other message. During the remaining four months of the year, when PG&E must share the envelope with TURN, the utility still remains free

to communicate with its customers: It can mail Progress to its customers under separate cover, or it could even include Progress in the billing envelope, provided it is willing to use a larger envelope and pay the additional costs. PG&E's freedom to speak is unimpaired.

PG&E also contends that by requiring it to place TURN materials in the billing envelope, the CPUC would force it to associate with the message of another, in violation of the principle elaborated in Wooley v. Maynard, 430 U.S. 705 (1977). In Wooley, New Hampshire sought to compel motorists to display the motto "Live Free or Die" on passenger vehicle license plates. The Court determined that the gravamen of unconstitutionality was "a state measure which forces an individual, as part of his

daily life -- indeed constantly while his automobile is in public view -- to be an instrument for fostering public adherence to an ideological point of view which he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment...to reserve from all official control.'" 430 U.S. at 715 (citations omitted). The distinctions between the CPUC order and the New Hampshire license plate are manifold and manifest.

First, the CPUC'S order can hardly be likened to the kind of affront to personal autonomy, to the "daily life" of the individual, as that presented in Wooley. The PG&E envelope is a mechanism for the transmittal of monthly bills and utility-related messages, not the "sphere of the

spirit." Second, while the information transmitted is of course related to utility issues, "no specific message is dictated by the State." To the contrary, the CPUC has authorized TURN to prepare its own material and requires TURN to disclaim any review or endorsement by the commission. This mitigates any possible "danger of governmental discrimination for or against a particular message." This Court in the Pruneyard Shopping Center v. Robins, 447 U.S. 74, 88, 87 (1980), decision found this factor critical in distinguishing Wooley, while affirming the California Supreme Court's decision allowing individuals to come on to a shopping center and distribute pamphlets expressing views not shared by the shopping center owner.

Finally, in Pruneyard, this Court

further distinguished Wooley by finding that the shopping center owner could dispel the Wooley "speech by association" problem by "expressly disavow[ing] any connection with the message by simply posting signs in the area where the speakers or handbillers stand." Id. at 87. Here, the CPUC has dealt with the question of disclaimer in a manner even more favorable to PG&E, by putting the burden on TURN to have its material clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E. If the shopping center owner's opportunity to disclaim message-by-association in Pruneyard was sufficient to distinguish Wooley, then surely TURN's obligation to issue the necesary disclaimer should eliminate any Wooley objection here.

Appellant's remaining argument attempts to tie together elements of the decisions in Wooley, supra, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), and Abood v. Detroit Board of Education, 431 U.S. 209 (1977), in support of an absolute denial of the right of any individual to obtain access to the property of any other in order to broadcast a message. Whatever the merit of the asserted doctrine in the abstract -- and it seems inconsistent with the decisions of this Court is Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969) and Pruneyard, supra, 447 U.S. at 74 -- in order for it to be of any assistance to PG&E, appellant must demonstrate that its privately-owned property is being used to broadcast TURN's message.

It is here that appellant's argument fails. The forum for TURN's communications is the extra space in the utility monthly billing envelope. The CPUC has determined as a matter of California public utility law that the extra space in the billing envelope is the property of the ratepayers, not the utility. (A.33). The California Supreme Court has affirmed that decision on appeal.

These California determinations are dispositive of PG&E's arguments. It is firmly established that property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law," Board of Regents v. Roth, 408 U.S. 564, 577 (1971).

It is the state of California which is "possessed of residual authority that enables it to define property in the first instance." Pruneyard, supra, 447 U.S. at 84. The state of California has examined the relative property interests of the utility and the ratepayers in the extra space in the billing envelope, and has defined the extra space in the billing envelope as the property of the ratepayers.

California's determination is a reasonable one. First, the extra space is the product of activity essential to utility regulation. (A.7). The ratepayers pay for the postage and other mailing costs incurred when PG&E sends out its monthly bill. Since postage costs are assessed in units of one ounce, and since the bill itself weighs less than one ounce, extra

space remains in the billing envelope. Since the extra space was paid for by the ratepayers, it is quite reasonable to say that it belongs to them.

Second, the CPUC's determination is consistent with the commission's long-established practice of requiring utilities to carry various public service announcements in the extra space of the billing envelope. As the commission explained below, "[u]se of the billing space to accomplish various informative functions for the benefit of ratepayers now occurs so frequently that it had become a routine matter." (A.7). The CPUC has directed California utilities to insert notices of applications for rate changes, notices of public hearings, notices of the availability of various energy conservation

programs, information concerning federal tax law changes, and an announcement of a new "lifeline" program designed to assist low-income people to remain on the telephone system in the wake of the divestiture of AT&T. (A.7). There is no evidence in the record that PG&E or any other California utility ever objected to carrying these messages in the extra space of the billing envelope. Yet under PG&E's theory, if the extra space is utility property, then all of these inserts would have been constitutionally suspect. Indeed, given the distinction drawn in Pruneyard between government-written messages and private-party messages, 447 U.S. at 87, these inserts would have been far more problematic than the TURN inserts at stake in the present case.

The primacy of the states in defining property interests, coupled with the reasonableness of the CPUC determination in light of both past, unchallenged practice and the source of the funds which create the extra space, establishes that the extra space is the property of the ratepayers and that PG&E can have no claim that its privately-owned property is being used to publish the message of another.

None of the cases PG&E relies on can bolster its argument. Wooley has already been shown to be inapposite. Tornillo, which struck down a Florida statute requiring a newspaper to publish a candidate's reply to criticism previously published by the newspaper, "rests on the principle that the State cannot tell a newspaper what it must print," Pruneyard,

447 U.S. at 88. The Florida statute "'exact[ed] a penalty on the basis of the content of a newspaper,' [and thus threatened to] 'dampe[n] the vigor and limi[t] the variety of public debate' by deterring editors from publishing controversial political statements....Thus, the statute was found to be an 'intrusion into the function of editors.'" Id., quoting Tornillo, 418 U.S. at 256, 257, 258.

The CPUC order, however, is not content-based, will have no impact on the editorial process, and will not deter controversial political statements. Indeed, by providing information on a range of disputed regulatory policy issues, TURN's inserts are more likely to provoke controversy than to prevent it. As in Pruneyard, the concerns underlying Tornillo

"obviously are not present here," 447 U.S. at 88.

Similarly, Abood provides no support for appellant's case. Abood invalidated a state law permitting public agencies to require employers to contribute to union political activities. Again, however, the gravamen of unconstitutionality in Abood is the contribution of one's own funds or property to propagate the message of another. Here, the property in question is the ratepayers', not the utility's.

Indeed, in a sense, Abood tends to buttress the CPUC's order. Ratepayer-funds were formerly used to finance the dissemination of PG&E messages only. Ratepayers who disagreed with the utility on questions of nuclear power, conservation, rate structures or other matters found themselves in

the position of financing communications to which they were opposed. It is the ratepayers, not PG&E, who more closely resemble the non-union employees in Abood.[3] The CPUC order will eliminate this one-sided use of ratepayer funds, and diversify the views presented. The CPUC order, without infringing on PG&E's freedom of speech, will thus vindicate the First Amendment interests of PG&E's ratepayers.

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In Consolidated Edison, supra, this Court noted but did not decide whether Abood precluded a utility from passing on to ratepayers the costs of bill inserts that discuss controversial issues of public policy. 447 U.S. at 543-44, n. 13.

CONCLUSION

For the reasons stated, the decision of the Supreme Court of California should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

BRIEF OF THE PUBLIC SERVICE COMMISSION AND THE ATTORNEY GENERAL OF THE STATE OF NEW YORK *AMICUS CURIAE*

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ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

BRIEF OF THE PUBLIC SERVICE COMMISSION AND THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

The Public Service Commission and the Attorney General of the State of New York hereby submits this brief as *amicus curiae* in support of the Appellee Public Utilities Commission of the State of California (California PUC).[1] We respectfully urge the Court to affirm the judgment of the California Supreme Court in all respects.

[1] Pursuant to Rule 36.2, there have been filed with the Clerk of the Court the written consents of all parties to the filing of this brief.

Interest Of *Amicus Curiae*

Like the California PUC, the Public Service Commission of the State of New York (New York PSC) is charged with the responsibility of regulating electric, gas, telephone, and water utilities to ensure that essential public services are furnished to consumers under nondiscriminatory terms and at just and reasonable rates. See N.Y. Pub. Serv. Law, §§65, 89-b, 91. Pursuant to this mandate, New York has determined (as California did before it) that utility ratepayers, like utility shareholders, should be permitted access to the substantial "extra space" that exists in the monthly (or bi-monthly) billing envelopes received by ratepayers from their respective utility companies. See *Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities Billing Envelopes* (N.Y.P.S.C. Case 28655, May 14, 1984), *reh'g denied* (Nov. 14, 1984), reproduced in the Appendix to PGandE's Jurisdictional Statement, at 111a-138a. Such ratepayer access is to be accomplished by allowing one or more nonprofit, voluntary ratepayer organizations to enclose inserts in the customer billing envelope several times per year. Such inserts would typically inform ratepayers of the organization's existence and its function of representing ratepayers in regulatory proceedings, seek ratepayer membership therein, and (perhaps) discuss various utility/energy-related issues. A principal objective of providing billing envelope access to ratepayer groups is to provide citizen-ratepayers with a more direct and meaningful opportunity to participate in the regulatory process, thereby enhancing the fact-finding and decisional process, and contributing to the

State's substantial governmental interest in maintaining just and reasonable rates for utility service.[2] App. to Juris. Statement 118a, 138a.

In establishing its ratepayer access procedures, the New York PSC was sensitive to the fact that the utilities' speech is entitled to First Amendment protection. It also recognized that it is the ratepayers which have created and financed the "extra space" in the billing envelope through the utility rates they pay, that the billing envelope and its contents have long been subject to public interest regulation by the State, and that utility shareholders have used such "ratepayer-financed" extra space to disseminate their particular views on various political, social and service-related topics of the day.

New York is vitally interested in the outcome of the instant case because the procedures we have implemented to ensure that the utilities' First Amendment rights are not infringed are similar to those employed by the California PUC. Specifically, both New York's and California's access programs do *not* restrict the utilities from continuing to enclose inserts in the billing envelope, even in those months when a ratepayer

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[2] In its Case 28655 *supra*, the New York PSC received extensive oral and written statements and briefs from a diverse group of interested parties, including regulatory, utility, and consumer officials from New York and across the country. *Id.*, Transcript Vols. I-VI. Many of these officials expressed their belief that ordinary ratepayers lacked a meaningful opportunity to participate in and impact on the rate-setting process. This circumstance was contrasted vividly to the recognized ability of the utilities to present and litigate their case in the regulatory process. In rendering its decision in Case 28655 the New York PSC concluded that increased ratepayer representation in the regulatory process was in the public interest. App. to Juris. Statement 138a.

group has accessed some or all of the "extra space." And, under both programs, ratepayer organization inserts will be clearly identified as such, thus making it extremely unlikely that the views expressed in such inserts will be identified as those of the utility or its shareholders. Given these and other similarities between California's and New York's programs, the Court's disposition of the instant case may very well determine whether New York's ratepayer access process goes forward.[3]

[3] By decision issued April 10, 1985, the New York Supreme Court (Albany County) invalidated the Commission's access procedures as violative of the utilities' First Amendment rights. *Matter of Consolidated Edison Co. of N.Y. v. Public Service Comm.*, Index No. 10762-84. Our appeal to the Appellate Division, Third Department, is pending.

Summary Of Argument

First, much of PGandE's First Amendment argument is based on the premise that its ability to continue to communicate with ratepayers through the vehicle of the billing envelope is being suppressed. This premise is, quite simply, incorrect. Second, PGandE's assertion to the effect that "its own billing envelopes" are somehow immune from legitimate public interest regulation by the State is utterly devoid of merit. Finally, the Court's holding in *PruneYard Shopping Center v. Robins* (447 U.S. 74) dictates rejection of PGandE's arguments concerning an alleged infringement of its right to refrain from speaking or associating with the speech of others.

ARGUMENT

I. PGandE's Continued Use Of The Billing Envelope As A Means Of Communicating With Ratepayers Is Not Restricted By The California PUC's Decisions.

In *Consolidated Edison Co. v. Public Service Comm'n* (447 U.S. 530), the Court invalidated a New York PSC determination which had prohibited utility companies from using the billing envelope to communicate their views to ratepayers on "controversial issues of public policy." The Court held that the New York PSC's outright ban on such use of the billing envelope "directly infringed" on the utilities' freedom of speech and that New York's action was neither a valid time, place or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest. *Id.* at 544.

In an attempt to analogize the facts of the instant case to those present in *Consolidated Edison*, PGandE characterizes the California PUC's decisions herein as similarly restricting or suppressing its ability to use the customer billing envelope as a means of disseminating its views and communicating with ratepayers. Specifically, PGandE states that it is problematical whether it "will be able to speak to its customers at all during those four months" per year when TURN has been granted access to the extra space in the billing envelope and that California's decisions will "severely restrict PGandE's ability to select the content of the billing envelope sent to customers." Brief for Appellant, p. 12.

This attempt to analogize California's ratepayer access procedures to the outright ban on certain utility bill inserts at issue in *Consolidated Edison* should be rejected for it is *undisputed* that California's decisions do

not suppress, bar, or otherwise restrict PGandE from continuing to fully use the billing envelope as a means of communicating with ratepayers. Specifically, during the eight months per year when TURN is not accessing the extra space in the billing envelope, PGandE is free to enclose its own inserts in such extra space, thus allowing PGandE's shareholders to continue to enjoy a "free ride" for the dissemination of their views to ratepayers. See, generally, *Consolidated Edison, supra*, 447 U.S. at 551-555 (Blackmun, J., dissenting). And during the four months when TURN is accessing the extra space, the California PUC's decisions permit PGandE to utilize any remaining extra space,[4] again without its shareholders being assessed any of the fixed costs of such communication. Moreover, if PGandE determines in any of those four months that such remaining "extra space" is insufficient to accommodate all of its shareholders' communications, *nothing in the California PUC's decision prevents PGandE from enclosing as much communicative material in the billing envelope as it wishes.* While it is true that in these circumstances PGandE's shareholders may have to bear the postage costs[5] associated with their communications—and thus

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[4] In the Order Instituting Proceeding in its Case 28655, *supra*, the New York PSC determined that there was "extra space" in the billing envelope even in those months when the utilities had enclosed their own inserts. *Id.* at p. 4. Thus, a ratepayer group's insert will not necessarily use all (or even most) of the extra space in any particular month's billing envelope.

[5] The *amicus curiae* Consolidated Edison Company of New York, Inc. estimates on brief (p.4) that the postage costs to be borne by PGandE's shareholders would be $630,000 per mailing. This figure can be seen to be both *de minimus* and reasonable when one considers that PGandE's annual operating revenues are in excess of $7.8 billion and that the billing envelope is an extremely effective medium for disseminating (or promoting) one's views.

not enjoy the "free ride" for their communications they have grown accustomed to—such circumstances clearly do not constitute restriction or suppression of PGandE's ability to communicate with ratepayers through the use of the billing envelope. See *Matter of Consolidated Edison Co. of N.Y. v. Public Serv. Comm.*, 107 AD2d 73 (N.Y. App. Div., 3d Dept., Feb. 21, 1985), *appeal pending*. Nor do such circumstances otherwise constitute State infringement of PGandE's First Amendment expressional rights for it is well-settled that the State is *not* obligated to ensure that a corporation's exercise of such rights is subsidized. See *Regan v. Taxation With Representation*, _____ U.S. _____, 103 S.Ct. 1997 at 2001 ["We again reject 'the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State'."]; *Rochester Gas & Elec. Co. v. Public Service Comm.*, 51 NY2d 823, 824-825, app dsmd for lack of substantial federal question 450 U.S. 961.

II. PGandE's Argument That "Its Billing Envelopes" Are Somehow Immune From Public Interest Regulation By The State Is Meritless.

Throughout its brief, PGandE makes assertions to the effect that California's regulatory scheme permitting ratepayer access to "its billing envelopes" is impermissible because PGandE "owns" such envelopes and does not wish to allow such access. See Brief for Appellant, pp. 9-10, 14, 20-21, 32-33. This apparent suggestion that the State is somehow barred from regulating the billing envelope (which is one of the most important and visible aspects of a utility's rendition of service) is contrary to well-settled principles of utility regulation.

From virtually the inception of public utility regulation in this country, the Court has held that one of the most vital of the States' police powers is the authority to regulate in the public interest utility companies conducting business within their boundaries. See, *e.g.*, *Munn v. Illinois* (94 U.S. 113, 125-130); *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm.* (_____ U.S. _____, 103 S. Ct. 1713, 1723); *Arkansas Elec. Co-op Corp. v. Arkansas Public Comm'n* (_____ U.S. _____, 103 S. Ct. 1905, 1908). And the Court has consistently recognized that the property of utility companies, as monopoly (or quasi-monopoly) enterprises possessing great economic power by virtue of the essential services they provide, is subject to extensive regulation by the States to ensure that consumers are protected from monopoly exploitation. *Cantor v. Detroit Edison Co.* (428 U.S. 579, 595-596); *Jackson v. Metropolitan Edison Co.* (419 U.S. 345, 350-351). The extent to which the States are empowered to regulate a utility's property is very broad; for instance, the New York PSC possesses explicit authority over "all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity . . ." N.Y. Pub. Serv. Law, §§2(12); 5(2). The California PUC has similarly been vested with extremely broad power to regulate virtually all aspects of the utilities' property and operations. See, *e.g.*, Cal. Pub. Util. Code §762 ["Whenever the Commission . . . finds that additions, extensions, repairs, or improvements to, or changes in the existing *plant, equipment, apparatus, facilities or other physical property of any public utility* . . . ought reasonably to be made . . . to promote the security or convenience of . . . the public . . . the Commission shall make and serve an

order directing that such extensions, repairs, improvements or changes be made . . ."] (emphasis added); see also *Id.*, §§761, 701.

Upon consideration of this virtual *plenary* authority over utilities' property that the States possess, it is absurd for PGandE to suggest that the billing envelope, as its "private property," is somehow not subject to legitimate public interest regulation by the State. Indeed, PGandE is unable to offer any rational explanation as to why the California PUC can admittedly regulate its "plant, equipment, facilities or other physical property" (Calif. Pub. Util. Code §762), but not, according to PGandE, the billing envelope and its contents. PGandE's property argument should be rejected.

One final point illustrates the flawed nature of PGandE's claim that it cannot legally be compelled by the State to enclose messages in the billing envelope which it does not wish to enclose (Brief for Appellant, p. 9). In *Consolidated Edison, supra,* the Court expressly recognized that utilities can, in fact, legally be directed by the State to enclose inserts in the billing envelope. 447 U.S. at 543. Indeed, many states (including New York) have enacted statutes or regulations granting their respective public utility commissions broad authority over the contents of the customer bill and envelope, with such authority including the power to direct the inclusion of certain types of bill inserts found necessary to the public interest and convenience. See, *e.g.*, N.Y. Pub. Serv. Law, §66(12-a).

III. The Court's Holding In *PruneYard* Dictates Rejection Of PGandE's Argument Concerning An Alleged Infringement Of Its Right To Refrain From Speaking Or Associating With The Speech Of Others.

Like the appellant in *PruneYard Shopping Center v. Robins* (447 U.S. 74), PGandE's central argument in this case is that it has an inviolate First Amendment right, as an owner of commercial property, never to be required by the State to allow such property to be used as a forum for the speech of others. Brief for Appellant, pp. 13-20. PGandE argues that by allowing TURN to place inserts "in its billing envelopes," the California PUC is impermissibly compelling it to "publish," "foster," and become associated with "ideological messages" it will find objectionable. *Id.* at 14-17. Again, like the appellant in *PruneYard,* PGandE relies principally on *Miami Herald Publishing Co. v. Tornillo* (418 U.S. 241) and *Wooley v. Maynard* (430 U.S. 705) as support for its argument.

As dictated by the Court's decision in *PruneYard,* PGandE's attempted application of the holdings in *Tornillo* and *Wooley* to the facts of the instant case need be rejected for several reasons. First, as expressly recognized by the Court in *PruneYard* (447 U.S. at 88), *Tornillo* involved the First Amendment *free press* issue of editorial control over *newspapers*—it did not involve other more obscure (and heavily regulated) means of communicating such as the customer billing envelope at issue here. Second, as also recognized in *PruneYard, Wooley* involved facts where the government itself prescribed the content of the ideological message ("Live Free or Die") and was thus seeking to convey an "official view" of state history and pride through such message's dissemination. *Wooley,* 430 U.S. at 717. And due to the

means of displaying the message at issue in *Wooley*, there was a likelihood that the appellee Mr. Maynard could be identified as fostering and adhering to such message.

Such circumstances clearly are not present in the instant case. The California PUC (like the New York PSC) is obviously *not* prescribing, in any way, the content of the ratepayer organization's messages (only TURN, of course, will determine the content of its own messages) and for anyone to suggest otherwise is to ignore the aggressive independence that ratepayer organizations traditionally maintain. And, like the commercial enterprise in *PruneYard*, there is no real possibility that the views of the speaker (*i.e.*, TURN) will be identified as those of PGandE's for such messages will indisputedly be identified as TURN messages. Indeed, PGandE's argument that ratepayers will likely conclude that PGandE supports or adheres to the views of TURN (Brief for Appellant, p. 19) is difficult to understand if one credits PGandE's assertions that TURN's messages will be hostile toward the company.

In addition to the facts in *PruneYard* that (1) the "ideological message" was not being prescribed by the State and (2) there was no likelihood that the speakers' views would be identified as those of the property's owners, the Court also deemed it essential that the property owner could expressly "disavow" any connection or association with the speakers or their message by, for instance, posting a sign stating that such speakers are communicating on the property by virtue of state law. *PruneYard*, 447 U.S. at 87. In the instant case, it is *undisputed* that PGandE can similarly

"disavow" any connection or association with the speaker (*i.e.*, TURN) by inserting in the billing envelope a disclaimer to that effect.

The final decisional factor set forth in *PruneYard* was that the property, as a business establishment, was not limited to the exclusive and private use of the owner. *Id.* Such circumstance is present in the instant case for as set forth in Point II, *supra* (and as documented in detail in the California PUC's brief), the customer billing envelope has not been limited to the exclusive or private use of PGandE. Rather, as regulated property used in the rendition of essential public services, the billing envelope has long been accessed by the State for a myriad of public purposes such as informing ratepayers of proposed rate and service changes, informing ratepayers of their rights *vis-a-vis* termination of service issues, and the like.

In sum, the factual circumstances in *PruneYard* are much more analogous to the instant case than those present in either *Tornillo* or *Wooley*. Inasmuch as PGandE's argument on the "compelled speech" and "forced association" issues are based largely on these two latter cases, the Court should reject PGandE's analysis.

Conclusion

For the reasons stated, the New York PSC respectfully requests that the judgment of the California Supreme Court be affirmed.

Respectfully submitted,

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No. 84-1044

IN THE
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OCTOBER TERM, 1985

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA, *et al.*,
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QUESTION PRESENTED

Whether a public utility commission's order, directing a public utility to include in the billing envelopes, which are paid for by the rate-payers, rate-payer information inserts prepared by a consumer group, offends the First Amendment, even though the utility retains the right to place its own inserts in the envelopes.

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IN THE
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On Appeal From The Supreme Court Of California

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, AND NATIONAL GOVERNORS' ASSOCIATION IN SUPPORT OF APPELLEES

INTEREST OF THE *AMICI* *

The *amici* are organizations whose members include state, county, and municipal governments and officials

* Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

This case presents the question whether the First Amendment prohibits a state from directing a privately owned public utility to include in the billing envelope, the cost of which is paid for by the ratepayers, materials prepared by a consumer representative group. The materials will provide information to the ratepayers that the state public utility commission has concluded would enhance the quality of consumer representation in rate-making proceedings.

Constitutional issues affecting the power of government to regulate in the public interest are of great importance to *amici* and their members. The question in this case is particularly important because a privately owned public utility receives the benefits of legally mandated monopoly status in exchange for reasonable regulation by the state. If the First Amendment were applied to limit the ability of state and local governments to regulate such businesses, governmental efforts to assure that public utilities properly serve the ratepayers would be seriously impaired.

STATEMENT OF THE CASE

Appellee Public Utilities Commission of the State of California (hereinafter "Commission") is a state agency that has been established in order to oversee the activities of utility companies that have been permitted to operate as monopolies free from a normal competitive environment, *see* Cal. Const. Article XII, Section 6, and, in general, to "supervise and regulate every public utility in the State . . . ." Cal. Publ. Util. Code § 701. Pacific Gas and Electric Company (hereinafter "PG&E"), the appellant, is a large California utility company that supplies electricity to customers in 47 of the state's 58 counties and gas to customers in 37 of the 58 counties. Brief

of Appellant Pacific Gas and Electric Company (hereinafter "Brief of Appellant") at 3. Appellee, Toward Utility Rate Normalization, or TURN, which initially brought the present case, was established to represent the interests of residential consumers in proceedings before the Commission, most notably in rate-making proceedings in which utilities, including PG&E, apply to raise the charges that they levy for provision of gas or electricity. *TURN v. Pacific Gas & Electric Company*, Decision 83-12-047, December 20, 1983, as modified by decision No. 84-05-039, May 2, 1984, Before the Public Utilities Commission of the State of California, Appendix A, Motion of the Public Utilities Commission of the State of California to Dismiss at A-17-19 (filed March 1, 1985) (hereinafter "Appendix A").

This case concerns the decision of the Commission to provide TURN with limited access to the billing envelopes used by PG&E. The TURN inserts will be designed to inform consumers about TURN and to seek financial assistance for the organization's activities. In addition, "[a]ll of TURN's material shall clearly identify TURN as its source and state that its contents have neither been reviewed or endorsed by PG&E or [the] Commission." Appendix A at A-39.

The Commission's order setting forth this requirement recognized that the State of California has traditionally "required the billing space to be used for the benefit of ratepayers." Appendix A at A-8. In the past, the state had mandated that billing envelopes contain information, including notices of proposed rate increases and of public hearings, designed to further effective regulation. Appendix A at A-7. The inclusion of the TURN insert serves the same purpose.

In addition, the Commission had determined in a prior proceeding that the "extra space" in the envelope is "the property of ratepayers." *Id.* at A-6; *see id.* at A-15. Extra space is "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal

notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." *Id.* at A-3. Consistent with its understanding that the extra space belongs to the ratepayers, the Commission recognized that "a utility in another state has sold the extra space for commercial advertising unrelated to the utility's business and used the resulting revenues to reduce rates to customers" rather than remitting those profits to its shareholders. *Id.* at A-8.

Finally, the Commission concluded that its work would be aided by inclusion of a billing insert that permits TURN to communicate with ratepayers. The Commission found that "there are many positions which TURN takes regarding PG&E that would be shared by substantially all [residential] ratepayers," *id.* at A-18, and that TURN's participation in Commission proceedings provides valuable assistance to the Commission. The Commission explained that such participation "tends to enhance the record in our proceedings." *Id.* at A-19 (quoting *Center for Public Interest Law and Robert L. Simmons v. San Diego Gas & Electric Company*, D.83-04-020, 7-8 (April 6, 1983)). Although the staff of the Commission has the primary responsibility for representing the public interest in rate proceedings, only consumer groups —unlike the staff—have the power to seek rehearing and judicial review of Commission orders, and such groups—also unlike the staff—will not be "subject to institutional pressures that can create conflicts of interest." *Id.* at A-20 (quoting *Consumers Lobby Against Monopolies v. PUC*, 25 Cal.3d 891, 908 (1979)). Accordingly, the Commission concluded that use of the extra space in order to assure that "residential ratepayers in PG&E's service territory would be given an opportunity to be informed of and to support advocacy efforts on their behalf" would be "an appropriate and efficient use of the extra space," *id.* at A-21, that would benefit the ratepayers. *Id.* at A-22.

The Commission ordered that TURN be given "access to the extra space in the billing envelope four times a

year for the next two years." *Id.* During that time, PG&E will remain free to enclose its own bill inserts into the envelope. It will have the exclusive right to do so in eight months of every year and it "may also make use of any of the extra space not used by TURN during the months TURN's material is inserted." *Id.* Nothing in the Commission's order prevents PG&E from sending bill inserts in the same envelope even if there is no extra space in those months so long as the utility pays any additional postage required by the presence of its insert.

SUMMARY OF ARGUMENT

PG&E presents an unconvincing argument to this Court. In the utility's view, the Commission has ordered it to yield its exclusive dominion over the billing envelope and ordered it to carry a message with which it may not agree. Thus, PG&E analogizes itself to the Jehovah's Witness who was forced to display on his automobile an ideological slogan with which he did not agree, *see Wooley v. Maynard*, 430 U.S. 705 (1977), or a newspaper forced to include statements of third parties among its editorial contents, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). *See, e.g.*, Brief of Appellant at 9-10, 14.

The position taken by PG&E before this Court is not tenable. *First*, the billing envelope has never been treated as the exclusive preserve of PG&E. Rather, in California, as in many other states, the billing envelope, and indeed the bill itself, has been closely regulated by the state in order to assure that consumers receive information necessary to their interests. Most notably, other states require that consumers be informed of the means by which they may participate effectively in regulatory proceedings. The Commission's order in this case carries on that tradition.

Second, the state interest in permitting TURN access to the billing envelope is legitimate and it is weighty. Unlike most businesses, PG&E operates a legally-mandated monopoly. The effect of this monopoly grant is,

of course, to shelter the utility from the normal price competition of the marketplace. The Commission has the responsibility to regulate rates and it can better do so if TURN, which has a proven record of participation in Commission proceedings, is able to explain to ratepayers that it is available to represent their interests before the Commission. TURN not only aids ratepayers but, more to the point, its presence aids the Commission in effectively regulating utility monopolies.

Third, the inclusion of TURN's message will not force PG&E to be associated with TURN's speech. Precisely because billing envelopes have traditionally served as a means of communicating messages of interest to ratepayers, the TURN message will be recognized as another statement included in the billing envelope for the public benefit. No reasonable ratepayer will assume from the presence of the TURN insert that PG&E has associated itself with TURN's desire to monitor utility activities. Indeed, the Commission's order requires TURN to identify itself as the source of its inserts, and to state that their contents have been neither reviewed nor endorsed by PG&E or the Commission itself. Moreover, the Commission order does not require that PG&E yield any dominion over its own inserts; the utility must only continue the practice of sharing space in the billing envelope.

Fourth, the sole impact on PG&E may be that it is sometimes forced to pay for its own speech. If the TURN insert occupies all of the extra space, then PG&E will have to pay for additional postage required by its insert. But such a rule infringes no First Amendment interest. The rule that a state cannot bar a public utility from speaking, *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), does not prevent a state from restricting the extent to which a public utility's speech is subsidized by ratepayers.

Fifth, the Commission's order does not constitute the "taking" of property without just compensation. The extra space belongs to the ratepayers, and even PG&E

concedes that it can be forced to pay for the use of that space. Moreover, even if the extra space belonged to PG&E, the taking issue would not be ripe for review because the Commission order leaves open the possibility that PG&E will be able to use the billing envelope in precisely the manner it wishes. In any event, and under any circumstances, the Commission's order would not infringe property interests so severely as to justify the conclusion that its order constitutes a taking. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

ARGUMENT

I. THE CONTENTS OF BILLING ENVELOPES ARE REGULATED BY MANY STATES IN ORDER TO PROVIDE INFORMATION BENEFICIAL TO CONSUMERS

PG&E contends that it has traditionally "exercised discretion in selecting the content of its billing envelope." Brief of Appellant at 11. This assertion is, at best, misleading because PG&E fails to explain that the Commission traditionally has overseen the contents of the billing envelope.

The historical practice in California confirms this tradition. In 1913, the Commission's predecessor ordered a water company to inform its customers of the amount of water used each month "and of the rate and amount to be paid." *Slinack v. Inglewood Water Co.*, 3 C.R.C. 752, 757 (1913). Six years later, the Commission adopted rules governing electrical service and ordered that each electric bill reprint the regulations "regarding payment of bills, disputed bills and discontinued service." *Pacific Gas and Electric Co.*, 17 C.R.C. 143, 147 (1919).

The Commission's authority has not been limited to regulation of the bill itself. In 1982, the Commission

ordered PG&E to "mail to all its customers a bill insert which describes the components of the utility's costs" and required PG&E to submit the insert to its Executive Director for approval "prior to inclusion with any customer's bill." Appendix B, Appendices to Respondents' Answer to Petitions for Review, S.F. Nos. 24734, 35&37 (Filed July 19, 1984) (quoting *Application of Pacific Gas and Electric Company*, Decision No. 93887 (Dec. 30, 1981)). The Commission also has required that bill inserts be placed in the billing envelope "explaining the reasons behind [a] rate increase," *Pacific Gas and Electric Co.*, Decision No. 82-04-117 (April 28, 1982), slip op. at 21; and describing the components of utility costs, *San Diego Gas and Electric Co.*, Decision No. 82-03-073 (March 16, 1982), slip op. at 1, 2.

In addition, California has enacted legislation that requires certain information to be furnished to utility customers. Section 454 of the California Public Utilities Code requires each utility that proposes a rate increase to notify its customers of the proposal. The statute contemplates that the notice will be inserted in bill envelopes and requires that it "shall state the amount of the proposed increase expressed in both dollar and percentage terms, a brief statement of the reasons the increase is required or sought, and the mailing address of the commission to which any customer inquiries relative to the proposed increase . . . may be directed."

Regulation of the content of the utility's bills and mandated inclusion of bill inserts is by no means confined to California. As the following discussion demonstrates, many states have concluded that utilities must provide ratepayers with information necessary to permit their customers to monitor and, when necessary, to object to utility activities and proposals.

A. Regulation of the Content of Utility Bills

States across the nation dictate to utilities the information that must be disclosed on customers' bills. For example, the Virginia Corporation Commission requires that before a late payment may be charged to a ratepayer a utility must "show on its customer bill, in addition to other necessary information, the date on which the bill is delivered to the U.S. mail, or delivered to the customer's premises, together with showing the date by which payment must be received in the utility's offices to avoid late payment charges." *In re: Investigation to Determine the Reasonableness of Certain Practices and Charges by Public Utilities*, Case No. 19589, Annual Report of State Corporation Commission (Jan. 10, 1977). Florida requires that bills for electric service contain a series of specific statements designed to assist the ratepayer. They include: (i) kilowatt-hours consumed, (ii) the customer charge, (iii) a breakdown of the charges due, (iv) identification of the applicable rate schedule, and (v) the average daily kilowatt consumption "for the current period and for the same period in the previous year." Electric Service Chapter 25-06.100. Similar requirements are in effect in Alaska,[1] Idaho,[2] New Mexico,[3] and Oklahoma.[4]

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[1] *See* 3 AAC 48.550(g) (Jan. 1985) ("Customer bills must, at a minimum, separately identify the following information for the billing period: customer charges; total kilowatt-hour consumption and associated energy charges; monthly kilowatt maximum demand and associated demand charges; and the energy surcharge, if appropriate. If billing is based upon an estimate, the customer bill must also reflect this information").

[2] *See* IDAPA 31.C § 10.3 (requiring each gas and electric bill to show a comparison between current consumption and consumption in the same period a year earlier).

[3] *See* Rules and Regulations Governing Residential Customer Services By Gas, Electric and Rural Electric Cooperative Utilities, General Order No. 34, Section 2.3 (Oct. 26, 1979) (requiring disclosure of sixteen specified items).

[4] *See* Oklahoma Code Title 17, Section 254 ("each public utility subject to a fuel adjustment clause shall separately disclose in its

Regulation of bills has also been undertaken in order to assure that ratepayers have the information necessary to challenge utility actions. In Minnesota, for example, gas and electric utilities must include on their bills either (i) a statement informing customers "where the customer may initiate an inquiry or a complaint" or (ii) "a concise statement as to where such information can be obtained." Section 7820.0200(C), Regulations of the Public Utilities Commission. Similarly, the New Mexico Public Service Commission requires gas and electric utilities in that state to include in their bill an address "where the residential customer may initiate an inquiry or complaint regarding the bill as rendered or the service provided." Section 2.3(O), General Order No. 34, *supra*.

B. State-Mandated Communications Contained in Billing Envelopes

State regulation does not extend only to the utility bill itself. Rather, a number of states, like California, have mandated that utilities supply their consumers with information that, in the state's view, will further the regulatory process. Often, such information may—or must—be communicated by means of a bill insert. Indeed, the presence of legally-mandated notices in billing envelopes appears to be so noncontroversial that the California Public Utilities Commission has defined "extra space" in the billing envelope as that space left unused after the inclusion of the bill *and* required legal notices. *See* text at 3-4 *supra*. PG&E's failure to quarrel with that definition indicates that it too recognizes the legitimacy of state-mandated bill inserts.

States commonly require that utilities inform their customers of proposed rate increases. In North Carolina,

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customer bills the per unit cost of its fuel, purchased power or purchased gas adjustment."); Rule 35, Electric Rules of the Oklahoma Corporation Commission (requiring eleven specified items of information).

each electric utility that files an application with the Utilities Commission for a change in its rates must "provide a bill insert notifying its customers of such application . . ." Rule R8-49, Rules and Regulations, Electric Light and Power. The "form of such notices will be supplied to the utility by the Commission" and will normally contain five specific categories of information including a schedule of public hearings. *Id.* The Maine Public Utilities Commission has also required utilities to include notice of proposed rate increases in billing envelopes. *See* Rule 6(B)(1)(b), Rules of Practice and Procedure (notice of permanent rate increase). Ohio's Rules of Public Utilities Commission, §§ 4909.191(A) and 4901:1-11.10(c), also mandate such notice.

Other states require that such notice be given to each customer although they do not mandate that a utility include the notice in the billing envelope. Idaho, for example, provides that notice of proposed rate increases "may be mailed to customers as bill stuffers over the course of a billing cycle." IDAPA 31.C § 10.2. States with similar requirements include Florida, *see* Section 25-22.406, *supra*; Minnesota, *see* Section 7830.3200; Indiana, 170 IAC 4-1-18; and South Carolina, *see* South Carolina Code of Laws, Vol. 26 R. 103-330 (code § 53-3-140) (1976) (electric utilities); *id.* at 103-430 (gas utilities).

Similarly, some states require that utilities send annual messages to consumers. In New Mexico, utilities are required to provide their customers annually with a statement, which may be enclosed in the billing envelope, "that summarizes the rights and responsibilities of the utilities and its residential customers . . . .," Section 4.3, General Order No. 34, *supra*. North Dakota utilities must insert into their bills an annual statement that (i) summarizes the existing rate schedule applicable to major classes of customers, (ii) identifies any classes whose rates are not summarized, and (iii) gives "notice calling the attention

of the customers to the availability of alternative rate schedules . . . ." Regulation 69-02-02.1(3)(c), North Dakota Public Service Commission. North Carolina requires that each utility provide an annual "breakdown of its operating expenses" and permits that information to be conveyed by means of a bill insert. R8-50.

C. State-Mandated Notice Promoting Effective Citizen Participation

At least five states require utilities to inform consumers how they may seek assistance to contest utility actions. In the State of Washington, notices of proposed rate increases must be sent to each customer either in a bill insert or in a separate mailing. That notice must "contain the information that a public counsel will be appointed to represent the public" and must include the address of the public counsel. WAC 480-80-125 (1983). Similarly, New Hampshire requires each electric utility to transmit as a bill enclosure an annual statement to consumers that includes the telephone number of the consumer assistant at the state Public Utilities Commission. *See* Rule 303.03(e), Rules, Electric Service.

Three states, Illinois, Oregon and Wisconsin, have created citizens utility boards to participate in the regulatory process and have empowered those boards to insert messages in billing envelopes. For example, Illinois' Citizens Utility Board represents consumer interests before the Illinois Commerce Commission, which regulates utility rates. Ill. Code, Chapter 111⅔, Section 902. By statute, the Citizens Utility Board is empowered to prepare bill inserts that inform consumers of the Board's purpose and activities. *Id.* at Section 909. No more than four such inserts may be included in a customer's billing envelope in any one year. *Id.* at Section 909(2)(b).

By voter initiative, the people of Oregon have established a Citizens Utility Board to represent consumer

interests and have empowered the Board, like its Illinois counterpart, to include consumer materials in billing envelopes. Section 10, Measure No. 3 (enacted Nov. 6, 1984). And Wisconsin's Citizens Utility Board is permitted to send two bill inserts annually that inform consumers of its activities. Wis. Stat. § 199.10(2)(b).

These widespread practices demonstrate that states across the nation have recognized that effective regulation requires that consumers be informed of essential facts concerning the activities of regulated monopolies. Those facts include, as an inherent part of regulation, information alerting consumers to the means by which they may question or challenge utility action. None of these requirements limits the ability of public utilities to add their voices to political or social debate, *see Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), but all of the regulations recognize that utilities cannot be relied upon voluntarily to supply their customers with all needed information. State-mandated disclosures within billing envelopes are a well-established and traditional means of accomplishing legitimate regulatory goals. A decision that such regulation is unconstitutional would seriously impede the ability of states to ensure that regulated monopolies are acting in the public interest.[5]

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[5] The federal government has also recognized the propriety of state regulation that requires government-sanctioned monopolies to carry the speech of third persons. The Cable Communications Policy Act of 1984 authorizes local governments to require "that channel capacity [of cable systems] be designated for public, educational, or governmental use . . . ." 47 U.S.C. § 531(b). Although those channels will be operated by the local cable system and broadcast over its equipment, the statute specifically states that the cable operator "shall not exercise any editorial control" over such channels. *Id.* at § 531(e).

II. THE COMMISSION'S ORDER DIRECTLY SERVES THE PUBLIC INTEREST BY ENHANCING THE EFFECTIVENESS OF UTILITY REGULATION

The TURN insert supports the valuable contribution TURN makes to regulatory efforts. As the survey of state regulation indicates, *see* text at 9-13, *supra*, the unusual economic position of public utilities requires special surveillance of their relationships with their customers. Often, this surveillance takes the form of requirements that utilities disclose specific information as in, for example, the multiple state regulations mandating the disclosure of pending ratemaking proceedings. The state interest is not exhausted, however, when some information regarding a utility's plans is disclosed. Rather, the state has an important interest in ensuring the disclosure of all information that will assist a public utility commission in carrying out its duty to regulate utilities in the public interest. The TURN insert, which reveals the existence of an organization able to intervene in commission proceedings on behalf of consumer interests, directly promotes effective regulation.

The legitimacy of the Commission's order cannot be isolated from the regulatory environment in which it will be implemented. Public utilities like PG&E are regulated monopolies shielded from the rigors of competition. *See* A. Kahn, The Economics of Regulations, 114-15 (1971). Because the marketplace provides no restraint on their pricing behavior, public utilities would inevitably engage in monopolistic pricing if they were not restrained by some non-market mechanism. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595-96 (1976); *see also Slinack v. Inglewood Water Co.*, 3 C.R.C. at 755-56 (manager of water company "admitted, under oath, that the company's conduct towards the public would be very different if the company were subject to competition.") California, like states across the nation, has decided to invest its public utilities commission with the legal authority to set utility prices in the public interest. *See* Cal. Const. Art. XII, Section 6, Cal. PUC Code Section 701.

As Justice Blackmun has noted, the existence of the monopoly grant "justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 550 (dissenting opinion). The ability of the Commission to exercise its oversight responsibilities when it considers proposed rate increases necessarily depends on its ability to discern the bases of a utility's proposals and, if necessary, to expose flaws in the utility's reasoning. The staff of the Commission is empowered to carry out those duties. But the Commission has recognized that the presence of an adversary who has no regulatory responsibility may sharpen the issues and, as the Commission noted, "enhance the record" in regulatory proceedings. Appendix A at A-19. Because there are no competitors to oppose a utility's actions, and because residential consumers often lack the sophistication and technical expertise to challenge complex utility applications, the Commission recognized that TURN would be able to contribute to regulatory proceedings the kind of adversariness that our legal tradition has always understood to bring more reliable results in legal proceedings.

The desire to ensure greater accuracy in legal proceedings is obviously a legitimate state goal. And the means the Commission has selected is closely related to the attainment of that state interest. The TURN insert will permit that organization to inform consumers of its function and activities and allow it to solicit funds with which it will be able to participate in regulatory proceedings. The inclusion of the TURN insert in the billing envelope will thus enable TURN to communicate effectively with consumers and will increase the quality of its representation. Because TURN has the expertise and background to enable it to serve consumer interests, the Commission

correctly understood that inclusion of the TURN insert in billing envelopes would enhance the quality and effectiveness of the Commission's own actions.

This judgment is shared by other jurisdictions. The State of Illinois has established a Citizens Utility Board, with power to send bill inserts to ratepayers, in order "to promote the health, welfare, and prosperity of all of the citizens of this State by ensuring effective and democratic representation of utility consumers before the Illinois Commerce Commission," other administrative agencies and the courts. Ill. Code, Public Utilities, Chapter 111⅔, Section 902. The Illinois legislature has expressly labeled this goal as "a statewide interest and not a private or special concern." *Id.* The State of Washington requires that ratepayers be informed of pending rate increases and be provided with the address of a public counsel in order that "the customer is able reasonably to make an informed decision about whether to participate in the hearing process." WAC 480-80-125. In 1984, the State of Oregon established a citizens utility board because the "people of Oregon [found] that utility consumers need an effective advocate to assure that public policies affecting the quality and price of utility service reflect their needs and interests . . ." Measure No. 3, *supra*, section 1. Moreover, "utility consumers need a convenient manner of contributing to the funding of such an organization so that it can advocate forcefully and vigorously on their behalf concerning all matters of public policy affecting their health, welfare and economic well-being." *Id.*

The record before this Court is clear. The Commission's order is a carefully-tailored means of accomplishing an important state goal. As we demonstrate herein, *see* Parts III and IV, *infra*, the requirement that TURN's insert be carried, along with other legally-mandated notices, in the billing envelope infringes no First Amendment interest of any utility. Accordingly, the grounds

asserted by PG&E in its appeal from the Commission order provide no basis for reversal of that state judgment.

III. THE PRESENCE OF THE TURN INSERT WILL NOT FORCE PG&E TO SPONSOR SPEECH WITH WHICH IT MAY DISAGREE

The California Commission has ordered that, during a two-year experimental period, TURN will be permitted to include its inserts within billing envelopes four times a year. The order is wholly consistent with this Court's decision in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), which concerned an attempt by a public utility commission to prohibit public utilities from using bill inserts to discuss political matters. This Court held that such an order was unconstitutional because it impermissibly restricted the utility's ability to speak on issues of public importance.

In this case, by contrast, PG&E remains free to speak through its news letter, *Progress*, about any issues of its concern. The argument presented by PG&E to this Court, therefore, is not primarily that the California order violates *Consolidated Edison*, but rather that the order conflicts with this Court's decisions that limit the ability of a state to force a person or newspaper to sponsor speech with which he or she may disagree. *See Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). A close examination of those cases and this Court's subsequent treatment of them demonstrates, however, that the Commission's order impinges no First Amendment interest.

The *Miami Herald* case brought before this Court a state statute that guaranteed a political candidate the right to reply in a newspaper's pages to any criticism levied at him or her by that newspaper. The Court held that the statute violated the First Amendment right of

the newspaper to determine for itself the content of its news and editorial pages. As the Court explained, the "choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials —whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* at 258. Editorial discretion cannot be restricted because, although a "responsible press is an undoubtedly desirable goal, . . . press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Id.* at 256.

Wooley v. Maynard concerned the exercise of an individual's First Amendment rights. A New Hampshire law required residents to display on their automobiles a license plate carrying the inscription "Live Free or Die." For religious reasons, a state resident objected to the presence of the slogan on his automobile. This Court ruled the law unconstitutional because the state mandate "forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715.

Two more recent decisions of this Court have demonstrated, however, that in certain circumstances states may mandate access to means of communication or require disclosure by a public speaker without running afoul of the First Amendment. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), decided the same term as *Consolidated Edison*, the Court held that the State of California did not violate the First Amendment by forcing the owner of a shopping center to permit a youth group to hand out pamphlets and collect signatures within the shopping center. The Court distinguished *Wooley* because, *inter alia*, in the context of a shopping center the "views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of

the owner." *Id.* at 87. The Court similarly distinguished *Miami Herald* because that case "rests on the principle that the State cannot tell a newspaper what it must print," *id.* at 88, a concern not present in *Pruneyard*.

Recently, this Court discussed *Wooley* and *Miami Herald* in the context of commercial advertising. The Court held that a state may require an attorney to disclose in his or her advertisements certain information concerning the prosecution of a civil claim on a contingency basis. *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265, 2283 (1985). In so holding this Court recognized that "First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed . . . ." *Id.* at n. 14.

Taken as a whole, these cases demonstrate that the California order is wholly consistent with the First Amendment. *First*, PG&E, unlike the Miami Herald, is not being forced to include within its own speech the views of another. PG&E would have this Court believe that it will be compelled to "publish" the speech of third persons. Brief of Appellant at 10. But the California order does not compel PG&E to include TURN's message as part of its own insert. Rather, PG&E is ordered only to share with TURN—as it currently shares with other legally-mandated notices—the extra space available in the billing envelope. Indeed, because that extra space is owned by the ratepayers, the utility has no right to exercise editorial dominion over it. PG&E's editorial discretion is thus left unhampered.

Second, PG&E is not a newspaper whose ability to speak may be threatened by state action. As Justice White pointed out in his *Miami Herald* concurrence, a "newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed." 418 U.S. at 259. But PG&E *is* a pub-

lic utility that, like utilities across the nation, is subject to reasonable regulation mandating the provision of specified information to its customers. As in *Pruneyard*, therefore, the concerns that underlie the decision in *Miami Herald* "obviously are not present here." 447 U.S. at 88.

Third, there is no danger that the presence of the TURN insert will confuse consumers and cause them to believe that PG&E is "an instrument" for the consumer group's message. *Wooley v. Maynard*, 430 U.S. at 715. The TURN insert will be labeled expressly as such. Appendix A at A-39. Moreover, the longstanding practice in California is that billing envelopes serve as conduits of information. That practice is echoed across the nation. Utility customers understand, therefore, that the information contained within the billing envelope does not necessarily reflect the views of the utility. In these circumstances, the holding in *Pruneyard* is entirely applicable because, as in that case, the views expressed in the TURN insert "will not likely be identified" with PG&E. 447 U.S. at 87.

This Court's decision in *Consolidated Edison* directly supports the conclusion that consumers will be able to comprehend the true sponsor of the TURN message. In *Consolidated Edison*, the public utility commission argued that a prohibition on bill inserts was needed in order to protect the privacy rights of customers. But this Court understood that consumers were perfectly able to recognize a utility insert for what it was and to act accordingly. As the Court said, "the customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket." 447 U.S. at 542. There is no reason to believe that customers in California will be less discerning. Just as customers of Consolidated Edison could recognize the difference between the bill itself and the utility's political speech, so customers in California will

be able to distinguish between the utility's own inserts and the message transmitted by TURN.

Fourth, as in *Zauderer*, the TURN insert is merely a form of legally-required disclosure that directly serves the regulatory process. The constitutionality of such disclosure in the field of utility regulation was recently upheld by a New York court. *Brooklyn Union Gas Co. v. Public Service Commission*, 101 A.D.2d 453, 478 N.Y.S. 2d 78 (App. Div. 1984). That case concerned a utility commission order that natural gas utilities must include a disclosure in any promotional advertisement, stating that natural gas prices might be affected by deregulation and including a telephone number from which further information could be obtained. The court ruled that the disclaimer was not needed to prevent deceptive commercial speech, *id.* at 83, but nonetheless held the requirement constitutional. In so holding, the court recognized the substantial state interest in ensuring the provision of "complete information to consumers . . . ." *Id.* at 83.

Like the New York regulation, the Commission's order is intended not to eliminate deception in commercial speech, but to assist the regulatory process and to assure a fuller record on which the Commission can base its ratemaking orders. The TURN insert will accompany the utility bill, which is a form of commercial speech, and TURN's activities will be focused on the purely commercial activities of public utilities. Indeed, the intrusion on the utility here is substantially less severe than that approved in *Zauderer* because the required disclosures will appear in a separate insert and will not occupy any space purchased by the utility itself.

In sum, the Commission orders do not violate the First Amendment. PG&E will not be forced to "publish" any views, much less the views of anyone with whom it may disagree. The California order merely utilizes the billing envelope in the manner in which it has been tradition-

ally used: to convey information to ratepayers that, in the state's view, will assist effective regulation. California consumers, familiar with the usual uses of billing envelopes, will not confuse TURN's message with the speech contained in PG&E's own inserts. In these circumstances, no constitutionally-protected interest will be impaired.

IV. THE COMMISSION'S ORDER DOES NOT INFRINGE UPON ANY RIGHT OF PG&E TO ADD ITS VOICE TO PUBLIC DEBATE

The effect of the Commission's order is quite limited. During an experimental two-year period, TURN will be able to place an insert in billing envelopes four times per year. In the other months, PG&E is guaranteed the ability to place its inserts in the billing envelope as it has in the past. In months when the TURN insert is in the envelope, PG&E will be able to use any extra space that remains. Even if no extra space is available, PG&E will still be able to place its inserts in the envelope. It will simply have to pay the additional postage required.

Prior to the issuance of this order, California utilities have sent their inserts free of charge, because the ratepayers pay for the postage required to send the billing envelope, and the utilities have used the extra space contained therein. Appendix A at A-3. If the time ever comes when the presence of the TURN insert requires PG&E to pay for postage in order to include its own insert, then the Commission order may have the effect of limiting the extent to which the ratepayers of California subsidize the utility's speech. This limitation, however, does not constitute the restriction of a constitutional right.

The distinction between a constitutional right and the asserted right to a subsidy is well illustrated by the holdings of this Court in *Roe v. Wade*, 410 U.S. 113 (1973) and *Harris v. McRae*, 448 U.S. 297 (1980). In *Roe v. Wade*, the Court held that a woman has a constitutional right to obtain an abortion. In *Harris v. McRae*, the Court held, however, that the right to an abortion does not require the government to pay for an abortion. The Court explained that although "the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all of the advantages of that freedom." 448 U.S. at 317-18. The government may choose to fund the exercise of that right, but it is not constitutionally compelled to do so. *Id.* at 318; *see Regan v. Taxation with Representation*, 461 U.S. 540, 545-46 (1983).

The distinction between a right and the government's discretion whether to offer financial support for exercise of that right is the distinction between *Consolidated Edison* and this case. In *Consolidated Edison*, this Court struck down a New York prohibition that limited utility speech even if the utility paid for its speech in full. 447 U.S. at 543. By contrast, the Commission's order leaves PG&E free to use the billing envelope to speak any time it wishes. The mere fact that the Commission will not permit the utility to claim an exclusive right to a government subsidy infringes no legitimate First Amendment interest.

V. THE COMMISSION'S ORDER DOES NOT CONSTITUTE A "TAKING" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

Some amici have argued that the Commission's order is unlawful because it constitutes a "taking" of property without just compensation in contravention of the Fifth Amendment, as incorporated by the Fourteenth Amendment. PG&E has wisely chosen not to assert that contention before this Court, perhaps because it recognizes that, for the following reasons, the Fifth Amendment issue is entirely lacking in merit.

First, no property interest of PG&E can possibly be infringed by the Commission's order because the extra space in the envelope does not belong to PG&E. The Commission has found in at least two proceedings that the extra space in which the insert would be placed "is ratepayer property." Appendix A at A-3; *id.* at A-4, A-6. This Court has held that the sufficiency of a claimed property interest "must be decided by reference to state law." *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *see Pruneyard Shopping Center v. Robins*, 447 U.S. at 84; *Board of Curators v. Horowitz*, 435 U.S. 78, 82 (1978). This Court will not, therefore, overturn a "tenable" interpretation of state law finding that no property interest exists. *Bishop v. Wood*, 426 U.S. at 347.

In this case, the Commission's interpretation is obviously more than tenable. The Commission reached its conclusion in a previous proceeding, and it reaffirmed the principle in the proceeding below. Appendix A at A-3. The Commission's conclusion rests on the ground that ratepayers are legitimately charged for mailing costs and the extra space is, therefore, "an artifact generated with ratepayer funds . . ." Appendix A at A-4. A contrary result would confer upon PG&E "a benefit beyond the mailing expense legitimately recoverable from the ratepayers." *Id.*

No decision of this Court requires any other conclusion. Although the *Consolidated Edison* opinion states that the utility in that case wished "to utilize its own billing envelopes to promulgate its views," 447 U.S. at 540, the Court was merely describing the property interests as they may have appeared in the record of that case. Nothing in the Court's decision suggests it was establishing a general principal of federal property law decreeing that all billing envelopes in all states must belong to utilities. Similarly, the Court's opinion in *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926), which preceded *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), by twelve years, does

not restrict California's ability to apply its own property law to PG&E.

Second, any claim that the extra space is not owned by the ratepayers is barred by principles of *res judicata*. The Commission's initial determination that the extra space belongs to ratepayers was not appealed by PG&E. *See Motion to Dismiss of the Public Utilities Commission of the State of California*, No. 84-1044 at 8 (March 1, 1985). Accordingly, that question of state law may not be relitigated in this case. *See Consumers Lobby Against Monopolies v. PUC*, 25 Cal.3d 891, 901, 603 P.2d 41, 47, 160 Cal. Rptr. 124, 129 (1979); *People v. Western Air Lines, Inc.*, 42 Cal.2d 621, 630, 268 P.2d 723, 728, *appeal dismissed*, 348 U.S. 859, 860 (1954); *see also* Cal. Pub. Util. Code § 1709.

Third, PG&E in effect has conceded that it has no property interest that will be impaired by the Commission's order. In a pleading before this Court, PG&E has suggested that the state could, as an alternative course of action, "[a]sses[s] an economic value and charg[e] appellant for the value of the space . . . ." Appellant's Brief in Opposition To Motions To Dismiss at 2 n.2; *see id*, at 3 & n.3; *see also* Brief of Appellant at 39. If PG&E can be charged for its use of billing envelope space, then the only possible conclusion is that the extra space does not belong to PG&E. Even without determining whether the ratepayers own the extra space, there is no cause to conclude, in the face of PG&E's own statements, that the utility's property interest will be impaired in any way.

Fourth, even if PG&E owned the extra space, the record before this Court would not support a decision that the Commission's order constitutes a taking. That order permits TURN to place its insert in billing envelopes four times a year during a two-year experimental period. Although the TURN inserts will have priority over PG&E inserts, it remains uncertain whether

any TURN insert will occupy all of the available extra space. Absent such an eventuality, a time may never come during the two-year experimental period when PG&E is prevented from using its property in exactly the manner it wishes. In these circumstances, "there is as yet no concrete controversy" that can be decided by this Court. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *see Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 53 U.S.L.W. 4969 (June 28, 1985).

Fifth, this Court's decision in *Pruneyard Shopping Center v. Robins* requires the conclusion that, even if PG&E owned the extra space, and even if the taking issue were ripe for review, the Commission order is constitutional. In *Pruneyard*, this Court held that a California law mandating that pamphleteers be permitted on private property did not constitute the taking of property. Although the right to exclude others from the use of one's property is constitutionally recognized, *see Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), the Court concluded that there "is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property . . . ." 447 U.S. at 83; *see Andrus v. Allard*, 444 U.S. 51 (1979). The same holds true here. A form of regulation that may permit PG&E to operate unhampered and, at most, would require the utility to pay postage for the messages it wishes to transmit, *see* text at 22-23, *supra*, does not deprive that utility of "the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments." *Agins v. City of Tiburon*, 447 U.S. at 263 (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)).[6]

[6] The decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), requires no different outcome. The Court in that case held that a "permanent physical occupation" of real property constituted a taking. *Id.* at 421. The Court was careful in its discussion to distinguish "temporary and limited" incursions into the use of property like those considered in *Pruneyard*. *Id.* at 434. And the Court explained that "such temporary limitations are subject to a more complex balancing process to determine whether they are a taking." *Id.* at 435 n.12. In this case, that balancing process yields the same result reached by the *Pruneyard* Court.

CONCLUSION

The order under review in this case directly advances the governmental interest in effective regulation of public utilities. It accomplishes that important goal in a manner that does not infringe First or Fifth Amendment interests. Accordingly, the Court should affirm the judgment below.

Respectfully submitted,

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July 20, 1985

APPENDIX

APPENDIX

RELEVANT EXCERPTS FROM STATE CODES, RULES, AND REGULATIONS

Alaska Administrative Code

3 AAC 48.550. Rate Design.

(a) The customer or fixed charge may recover only those customer costs defined in 3 AAC 48.540(f)(1)(A) and (B). However, the commission will, in its discretion, consider requests to increase or decrease the fixed charge when the electric utility or any other party submits to the commission appropriate justification and analysis which relates to its pricing objectives. . . .

(g) Each electric utility shall design and, upon approval of the commission, distribute informative and understandable customer bills. Customer bills must, at a minimum, separately identify the following information for the billing period: customer charges; total kilowatt-hour consumption and associated energy charges; monthly kilowatt maximum demand and associated demand charges; and the energy surcharge, if appropriate. If billing is based upon an estimate, the customer bill must reflect this information.

3 AAC 50.300. Information to Electric Consumers.

(a) An electric utility shall provide to each new electric consumer, coincident with the application for service, a clear and concise explanation of any rate schedule in its currently effective tariff which applies to that consumer.

(b) Not later than 30 days after the filing of a tariff advice letter in which a change in a rate schedule is requested, an electric utility shall transmit to its affected consumers a clear and concise explanation of the proposed change. This provision does not apply to rate

adjustments resulting from an automatic fuel-cost rate adjustment clause.

(c) At least once each year, an electric utility shall transmit to each of its electric consumers an informative summary of any rate schedule in its current effective tariff which applies to those consumers.

(d) On request of an electric consumer, an electric utility shall transmit a clear and concise statement of the consumer's actual energy consumption and, if billed separately, power consumption for any billing period during the previous 12 months unless the information is not reasonably ascertainable by the utility.

Florida, Rules of the Public Service Commission

25-6.100 Customer Billings.

(1) Bills shall be rendered monthly and as promptly as possible following the reading of meters.

(2) By January 1, 1983, each customer's bill shall show at least the following information:

(a) The meter reading and the date the meter is read, in addition to the meter reading for the previous period. If the meter reading is estimated, the word "estimated" shall be prominently displayed on the bill.

(b) 1. Kilowatt-hours (KWH) consumed including on and off peak if customer is time of day metered.

2. Kilowatt (KW) demand, if applicable, including on and off peak if customer is time-of-day metered.

(c) The dollar amount of the bill, including separately:

1. Customer charge.

2. Energy (KWH) charge, exclusive of fuel, in cents per KWH, including amounts for on and

off peak if the customer is time-of-day metered and energy conservation costs.

3. Demand (KW) charge, exclusive of fuel, in dollar cost per KW, if applicable, including amounts for on and off peak if the customer is time-of-day metered.

4. Fuel cost in cents per KWH (no fuel costs shall be included in the base charge for demand or energy).

5. Total electric cost which is the sum of the customer charge, total fuel cost, total energy cost, and total demand cost.

6. Franchise fees, if applicable.

7. Taxes, as applicable on purchase of electricity by the customer.

8. Any discount or penalty, if applicable.

9. Past due balances shown separately.

10. The gross and net billing, if applicable.

(d) Identification of the applicable rate schedule.

(e) The date by which payment must be made in order to benefit from any discount or avoid any penalty, if applicable.

(f) The average daily KWH consumption for the current period and for the same period in the previous year, for the same customer at the same location.

(g) The delinquent date or the date after which the bill becomes past due.

(h) Any conversion factors which can be used by customers to convert from meter reading units to billing units. Where metering complexity makes this requirement impractical, a statement must be on the bill advising

that such information may be obtained by contacting the utility's local business office.

(i) Where budget billing is used, the bill shall contain the current month's consumption and charges separately from budgeted amounts.

(j) The name of the utility plus the address and telephone number of the local officer where the bill can be paid and any questions about the bill can be answered.

(3) When there is sufficient cause, an estimated bill may be submitted provided that with the third consecutive estimated bill the company shall contact the customer explaining the reason for the estimated billing and who to contact in order to obtain an actual meter reading. An actual meter reading must be taken at least once every six months. If an estimated bill appears to be abnormal when a subsequent reading is obtained, the bill for the entire period shall be computed at a rate which contemplates the use of service during the entire period and the estimated bill shall be deducted. If there is reasonable evidence that such use occurred during only one billing period, the bill shall be computed.

(4) The regular meter reading date may be advanced or postponed not more than five days without a proration of the billing for the period.

(5) Whenever the period of service for which an initial or opening bill is rendered is less than the normal billing period, the charges applicable to such service, including minimum charges, shall be pro-rated except that:

(a) Initial or opening bills need not be rendered, but the energy used during such period may be carried over to and included in the next regular monthly billing.

(6) The practices employed by each utility regarding customer billing shall have uniform application to all customers on the same rate schedule.

(7) Franchise Fees.

(a) When a municipality charges a utility any franchise fee, the utility may collect that fee only from its customers receiving service within that municipality. When a county charges a utility any franchise fee, the utility may collect that fee only from its customers receiving service within that county.

(b) A utility may not incorporate any franchise fee into its other rates for service.

(c) For the purposes of this subsection, the term "utility" shall mean any electric utility, rural electric cooperative, or municipal electric utility.

(d) This subsection shall not be construed as granting a municipality or county the authority to charge a franchise fee. This subsection only specifies the method of collection of a franchise fee, if a municipality or county, having authority to do so, charges a franchise fee.

25-22.405 Notice of Public Utility Hearings.

(1) The provisions of this rule shall apply to all public hearings conducted by the Commission, except rulemaking hearings held pursuant to 25-22.10 through .18, F.A.C.

(2) Notice of such public hearings shall be given by the Commission to the clerk of the board of county commissioners of each county affected, the chief executive officer of each municipality in the area affected, all parties of record and all persons who have requested notice of such proceedings.

(3) A summary of the subject matter and notice of hearing shall be published by the Commission in the Florida Administrative Weekly. The summary shall be drawn and notice given as required by the provisions of the statute under which relief is sought, if applicable, but shall not be published less than 14 days prior to the hearing.

(4) The Commission may require any public utility in such proceedings to publish additional notices in newspapers of general circulation in the area affected and to give notice to its customers by mail, as may be deemed reasonably necessary by the Commission to afford adequate notice to the customers of the utility.

(5) When the Commission determines that the health, safety, or welfare of the public requires an emergency hearing, notice may be accomplished by giving notice to those parties listed in subsection 2 not less than 48 hours prior to the time scheduled for the hearing.

25-22.406 Notice and Public Information on General Rate Increase Requests.

(1) The provisions of this rule shall be applicable to all requests for general rate increases by electric, gas, water and sewer utilities and telephone companies subject to the Commission's jurisdiction.

(2) Upon filing a petition for a general rate increase, the utility shall mail a copy of the petition to the chief executive officer of the governing body of each municipality and county within the service area affected.

(3) (a) Within 15 days after it has been notified by the Commission that the Minimum Filing Requirements (MFRs) have been met, the utility shall place a copy of the MFRs at its official headquarters and at its business office in each municipality in which service hearings were held in the last general rate case of the utility. Within 15 days after the time schedule has been mailed to the utility, copies of the MFRs shall be placed in the utility business office in each additional city in which service hearings are to be held. Upon customer request a copy of the MFRs shall be placed in a utility business office not located in a city where a service hearing is to be held. The copies of the MFRs shall be available for public inspection during the utility's regular business hours.

(b) In addition to the locations listed above, the Commission may require that copies of the MFRs be placed at other specified locations.

(4) (a) Within 15 days after the time schedule for the case has been mailed to the utility, the utility shall prepare and distribute a synopsis of the rate request. The synopsis shall be approved by the Commission or its staff prior to distribution and shall include:

1. A summary of the section of the MFRs showing a comparison of the present and proposed rates for major services;

2. A statement of the anticipated major issues involved in the rate case;

3. A copy of the executive summary filed with the MFRs.

4. A description of the ratemaking process at the time schedule established for the rate case;

5. The location at which complete MFRs are available.

(4) (b) Copies of the synopsis shall be distributed to the same locations as required for the MFRs, to the main county library within or most convenient to the service area and to the chief executive officer of each county and municipality within the service area affected.

(5) Within 30 days after the rate case time schedule has been mailed to the utility, the utility shall begin sending a notice approved by the Commission or its staff to its customers containing:

(a) A statement that the utility has applied for a rate increase and the general reasons for the request;

(b) The locations at which copies of the MFRs and synopsis are available;

(c) The time schedule established for the case, and the dates, times and locations of any hearings that have been scheduled; and

(d) A comparison of current rates and service charges and the proposed new rates and service charges.

1. Such notice shall be completed at least 10 days prior to the first scheduled service hearing.

(6) At least 7 days and not more than 20 days prior to each service hearing, the utility shall have published in a newspaper of general circulation in the area in which the hearing is to be held a display advertisement stating the date, time, location and purpose of the hearing. The advertisement shall be approved by the Commission or its staff prior to publication.

(7) When the Commission issues proposed agency action and a hearing is subsequently held, the utility shall give written notice of the hearing to its customers at least 14 days in advance of the hearing. This notice shall be approved by the Commission or its staff prior to distribution.

(8) Staff Assisted Water or Sewer Rate Requests. The following is applicable to a staff assisted rate request for a water or sewer utility as provided for in Rule 25-10.180, F.A.C.

(a) Upon receipt of the staff reports, the utility shall place copies of the application and staff reports, including a comparison of the present and proposed rates, at its office. The copies shall be available for public inspection during the utility's regular business hours.

(b) At least 14 days prior to the customer meeting, the utility shall send a notice to its customers containing:

1. The time, date, place and purpose of the meeting;

2. A statement that the utility has applied for a rate increase and the general reasons for the increase;

3. The location at which copies of the application and staff reports are available;

4. A comparison of the present and proposed rates;

5. A statement that any customer comments concerning the rate increase should be addressed to the Commission Clerk. The address and telephone number of Clerk shall be provided.

6 The utility's address, telephone number and business hours.

(c) Notice of the customer meeting shall be approved by the Commission or its staff in advance of distribution.

(9) After the Commission's issuance of an order granting or denying a rate change, the utility shall give notice to its customers of the order and the revised rates. The notice shall be approved in advance by the Commission or its staff and transmitted to the customers with the first bill containing the new rates.

Idaho IDAPA 31.C

§ 10.1 Explanation of Rate Schedule

Each natural gas and electric utility subject to the Commission's jurisdiction shall transmit annually to each of its customers and give to each new customer at the time of initiation of service a clear and concise explanation of the existing rate schedule for that customer.

§ 10.2 Notice

Each natural gas and electric utility subject to the Commission's jurisdiction which applies for a general rate increase or natural gas tracker increase shall transmit to each customer a statement telling the customer that the company has applied for a general rate increase or natural gas tracker increase and stating the overall percentage increase which the company is requesting. These

notices may be mailed to customers as bill stuffers over the course of a billing cycle.

§ 10.3 Comparison of Consumption

Each natural gas and electric utility subject to the Commission's jurisdiction shall compare on each customer's regular billing the customer's actual consumption of natural gas or electricity with the customer's actual consumption of natural gas or electricity for the corresponding billing period for the previous year. If the two billing periods compared contain a different number of days, the utility shall adjust the data to take into account the different length of the billing periods and show the comparison as either as absolute change in therm use or kilowatt hour use per day, week or month, or as a percentage change in therm use or kilowatt hour use per day, week or month.

§ 10.4 Degree-Day Data.

Upon request, each natural gas and electric utility subject to the Commission's jurisdiction shall make degree-day adjusted data available for comparisons of the kind made in the previous paragraph. The companies shall regularly disseminate this information through advertising or press releases to make it generally available to space-heating and air-conditioning customers.

Illinois Revised Statutes, Chapter 111⅔—Public Utilities

902. Purpose

§ 2. The purpose of this Act is to promote the health, welfare and prosperity of all the citizens of this State by ensuring effective and democratic representation of utility consumers before the Illinois Commerce Commission, the Federal Energy Regulatory Commission, the Federal Communications Commission, the courts, and other public bodies and by providing for consumer education on utility

service prices and on benefits and methods of energy conservation. Such purpose shall be deemed a statewide interest and not a private or special concern.

909. Mailing Procedure

§ 9. Mailing Procedure. (1) In this Section "enclosure" means a card, leaflet, envelope or combination thereof furnished by the corporation under this Section and "statement" means the text of material submitted by the corporation [Citizens Utility Board] to be printed on the face of a postcard billing or to be included in any enclosure as defined in [paragraph 909]. To accomplish its powers and duties under [paragraph 505], the corporation, subject to the following limitations, may prepare and furnish to any investor-owned Class A public utility an enclosure or a statement to be printed on the face of a postcard billing.

(a) An enclosure or statement furnished by the corporation under this Section may not be submitted to the utility less than 21 calendar days in advance of the date of the public utility's periodic customer billing. The utility shall include such enclosure or statement in or on its next periodic customer billing.

(b) An enclosure shall be of a size compatible with the utility's mailing envelope, shall otherwise conform to the specifications of the utility's billing enclosure inserting equipment and may not exceed in total weight .5 ounce avoir. In addition, if the public utility's periodic customer billing is by post card, the corporation may provide a plain envelope to include the enclosure and such billing, or the corporation may provide the utility with the text of a statement to be printed on the face of such billing in a space no larger than ⅝ of an inch by 3 inches. The corporation shall designate the size of type in which the statement is to be printed.

(c) An enclosure furnished by the corporation under this Section shall be limited to informing the reader of

the purpose, nature and activities of the corporation as set forth in this Act and informing the reader that the utility consumer billed may become a member in the corporation, maintain membership in the corporation and contribute money to the corporation directly. The enclosure may not have the character of a bill, statement or account. Information my include a membership application form.

(d) The corporation may not furnish any enclosure or statement to a public utility under this Section unless the enclosure or statement has been approved by the Illinois Commerce Commission under subsection (3).

(e) Upon the request of the corporation, each utility shall specify the capabilities of its billing enclosure and electronic transmission equipment within 21 calendar days of such request.

(2) (a) Except as provided under paragraph (b), any public utility furnished with an enclosure or statement under subsection (1) shall print or otherwise include or enclose such enclosure or statement within, upon or attached to the next periodic customer billing which the public utility mails or delivers to any consumer.

(b) No public utility may be required to include more than 4 enclosures or statements annually under subsection (1) in its periodic billing.

(3) Prior to furnishing a statement or enclosure to a utility under subsection (1), the corporation shall submit the enclosure to the Illinois Commerce Commission. The Illinois Commerce Commission shall approve the enclosure or statement if it determines that the enclosure (a) is not false or misleading and (b) satifies the requirements of this Act.

(4) The corporation shall promptly reimburse each public utility for all reasonable costs incurred by the public utility in complying with the Section above the utility's normal billing costs, provided that:

(a) The utility shall furnish the corporation with an itemized accounting of such additional costs.

(b) The corporation shall not be required to reimburse the public utility for postage costs if the weight of the corporation's enclosure does not exceed .35 ounce avoirdupois; and if the corporation's enclosure does exceed such weight, then it shall be only required to reimburse the public utility for postage costs over and above what the utility's postage cost would have been had the enclosure weighed only .35 ounce avoirdupois.

(c) If a utility is unable to collect any amount due from the corporation under this Section within 2 months after the bill is mailed to the corporation, the utility may refuse further requests to mail a statement or enclosure until the amount is paid, unless an action is pending in court.

(5) A dispute arising from the operation of this Section shall be resolved by negotiations between the corporation and the public utility if possible, or by a civil proceeding in circuit court.

Indiana Code Ann.

170 IAC 4-1-18—Informational pamphlets and rate schedules notice of proposed rate change

Section 18. Information Provided by Utilities to Applicants and Customers [Electric Utilities]

(A) Each utility must publish and distribute, without request, to all applicants for service and to all current customers, a comprehensive pamphlet which, in clear language, easily understandable to a layman, fully describes the rights and responsibilities of the customers.

(B) A utility shall supply free of charge a copy of the rate schedules applicable to the types of service available to new applicants for and existing customers of residential service, upon request by the applicant or customer.

(C) Each utility, whenever it petitions the commission for any change in its residential base rate schedules must furnish to each residential customer within forty-five (45) days of such request a notice which fairly summarizes the nature and extent of the proposed changes.

170 IAC 5-1-18—Information pamphlets and rate schedules; notice of proposed rate change

Sec. 18. Information Provided by Utilities to Applicant and Customers. [Gas Utilities]

(A) Each utility must publish and distribute, without request, to all applicants for service and to all current customers, a comprehensive pamphlet which, in clear language, easily understandable to a layman, fully describes the rights and responsibilities of the customers.

(B) A utility shall supply free of charge a copy of the rate schedules applicable to the types of service available to new applicants for and existing customers of residential service, upon request by the applicant or customer.

(C) Each utility, whenever it petitions the Commission for any change in its residential base rate schedules must furnish to each residential customer within forty-five (45) days of such request and prior to the date of the public hearing a notice which fairly summarizes the nature and extent of the proposed changes. Notice is not necessary, under this section, for tracking increases or decreases.

Maine Public Utilities Commission Chapter 11—Rules and Regulations and Procedure

6. Adjudicatory Proceedings.

B. Notice.

1. Notice of Proceedings. Upon commencement of an adjudicatory proceeding [general rate increase proceeding] by filing, petition, or otherwise, notice in the form

specified by paragraphs 6(B)(3), 6(B)(4), and 6(B)(5) shall be given as follows:

a. By the Administrative Director, to the persons whose legal rights, duties or privileges are at issue, by regular mail, within fifteen (15) days after commencement of the proceeding;

b. By a public utility, except a carrier of passengers or freight, in any proceding initiated by it and involving a general rate increase or a general rate increase proceeding. Notice by this provision shall be given by regular mail or by such other means as the utility may employ to deliver its bills, not later than fifteen (15) days after, nor earlier than ninety (90) days before the commencement of the proceeding. Before preparing its notice, the public utility shall inquire of the Office of the Administrative Director whether a deadline for intervention has been set, in order that the date may be included in the information required by Section 6(B)(5)(d).

c. By the Administrative Director, in any proceeding deemed by the Commission to involve the determination of issues of substantial public interest, to the public sufficently in advance of the anticipated time of the decision to afford interested persons and adquate opportunity to prepare and submit evidence and argument, to petition for intervention, and to request a hearing is so desired.

Minnesota—Rules of the Public Service Commission

7820.0200 Customer Information.

The utility is responsible for informing its customers of the following information as prescribed by the following provisions:

A. A sign or notice, which shall be approved by the commission, posted prominently and conspicuously at all utility office locations open to the general public. The sign or notice shall state where, when, and to whom a

complaint is to be directed, and the address of the Public Utilities Commission and its availability for mediation upon written request.

B. The utility shall, at its expense, publish customer information, that will be offered to each new customer, and upon request, to any existing customer. This customer information must be submitted to the commission for approval. This customer information must, at a minimum, include the following:

(1) The utility's own customer policies governing the following areas: bill collections; notice of disconnection; disconnection of service; reconnection of service; deposit and guarantee requirements; and meter reading procedures.

(2) The rate schedule pertaining to the customers of that area. The current rate schedule as required by part 7820.3200 may be attached to the information to meet this requirement.

(3) The title, addresses, and phone numbers of the department(s) of the utility to which complaints should be directed, including a telephone number for customers to call in emergency situations or a concise statement as to where such information can be obtained.

(4) The information contained in parts 7820.0300 and 7820.2700 to 7820.3000.

(5) This statement: "The Minnesota Public Utilities Commission regulates this utility and is available for mediation upon written request," and the address of the Minnesota Public Utilities Commission.

C. The utility's billing statements to its customers must contain this information:

(1) This statement: "Register any inquiry or complaint at ——" (and list the address and telephone number of the utility, designating where the customer may initiate an inquiry or a complaint, or a concise statement as to where such information can be obtained).

(2) A notice to customers of the availability upon request of the customer information.

7820.3500 Billing Content.

Bills rendered periodically to customers for electric and gas service shall include, but are not limited to, the following information:

A. the present and last preceding meter reading;

B. the date of the present reading;

C. identification of the applicable rate schedule;

D. the number and kinds of units metered;

E. a complete itemization of all charges incurred at each level of customer usage;

F. the amount of the bill;

G. the date on which the bill will become delinquent;

H. any late fee; if applicable;

I. If an estimated bill, clear and conspicuous language identifying the bill as an estimated bill;

J. the amount of state and local taxes separately itemized;

K. fuel or power adjustment clause separately itemized, if applicable; and

L. the information required by part 7820.0200, item C.

7830.3200 Notice Required When Utility Changes Rates.

Subpart 1. **Commission notice to governing bodies.**

When a utility has filed proposed changes in its rates or has requested new rates and charges, the commission shall, pursuant to statute, give notice by the governing bodies of each municipality or county in the area affected by such proposed changes. In addition, when determined by the commission to be appropriate, the utility proposing a change in rates shall notify individually its subscribers of the proposed change by billing stuffer or other appropriate method.

New Mexico—Rules and Regulations Governing Residential Customer Service by Gas, Electric and Rural Electric Cooperative Utilities

2.3--Contents of Bills. Bills for utility service shall provide information which clearly states:

A. The beginning and ending meter reading dates, or the number of days in the billing cycle, and the date of the ending meter reading.

B. Clear and conspicuous language identifying the bill as an estimated bill, if the bill has been estimated.

C. The number and kind of units metered.

D. Any meter conversions from meter reading units to billing units.

E. Any meter multiplier constants used to determine billing.

F. The date the bill is due.

G. Any previous balance.

H. An identification of the applicable rate tariff.

I. The amount due for electric or gas usage.

J. The amount due for special services.

K. The total amount due.

L. Gross receipts taxes and any other taxes, if not a part of the base rate.

M. The cost of service index, if applicable.

N. The automatic adjustment clauses approved by the Commission in total and in cost per unit basis, as applicable.

O. The address of the utility, designating where the residential customer may initiate an inquiry or complaint regarding the bill as rendered or the service provided.

P. If the residential customer is on a budget payment plan, a statement of (1) the actual charges for service incurred for the current billings period; (2) the budgeted amount due; and (3) the amount of credit or arrearage.

North Carolina Utilities Commission Rules and Regulations

Rule R8-50. Notification of Available Rate Schedules and Breakdown of Company Operating Expenses.

(a) At least once each calendar year, each electric utility shall notify its consumers of the rate schedules that are available within the rate classification in which such consumer falls. Such notice should contain brief summaries of all rate schedules within a consumer's rate classification. In addition, the notice shall contain a statement that "Complete Rate Schedules are available upon request." Each utility shall annually notify the Commission of the completion date of this notification.

(b) Each electric utility shall annually provide to each of its consumers a breakdown of its operating expenses for the most recent available twelve (12) month period expressed as a percent of each dollar of revenue. This information may be communicated generally as part of a regular bill insert, or if the utility does not include inserts with its bills, in a special mailing.

North Dakota Public Service Commission Rules

Section 69-09-02.1. Information to Electric Customers.

1. Each utility shall keep on file in every office of the utility where payments are received copies of its rate schedules and rules and regulations applicable thereto. Notice shall be given customers as to where this information is available as a part of the statement required by subsection 2.

2. Each utility shall send to each of its electric customers a statement containing a clear and concise explanation of the existing rate schedule, and any rate schedule applied for, that is applicable to such customer. The statement shall be sent:

   a. Not later than sixty days after the date of commencement of service to such customer or ninety days after October 1, 1980, whichever occurs last; and

   b. Not later than thirty days after such utility's application for any change in a rate schedule applicable to such customer.

   The statement addressing the rate schedule applied for shall include for each of the major classes of its electric customers for which there is a separate rate, a summary analysis which shows the economic impact of the proposed rate change and rate design changes, if any, for an average customer within a class based upon an average annual consumption of and a statement that the rate applied for are proposed only and that new rates will not be effective until commission action has been taken.

3. Each utility shall send to each of its electric customers not less frequently than once each year together with the customer's billing:

   a. A clear and concise summary of the existing rate schedules applicable to each of the major classes

   of its electric customers for which there is a separate rate;

   b. An identification of any classes whose rates are not summarized; and

   c. A notice calling the attention of the customer to the availability of alternative rate schedules for the customer's particular class of service and that, upon request, the utility will assist the customer in determining the billing for load conditions specified by the customer under various rate schedules. The customer, after selecting a particular rate schedule, shall take service under the rate schedule for a period of not less than twelve months, unless the rates are changed or there is a material change in the customer's load.

4. Each utility, upon request of an electric customer, shall, without charge, send the customer a clear and concise statement of the actual consumption and cost of electric energy by such customer for each billing period during the prior year, unless such consumption and cost data is not reasonably ascertainable by the utility.

5. Each utility shall file with the commission a sample copy of the statement format required by subsections 2 and 4 and a copy of the summary and notice required by subsection 3. Any format changes in statements or notices under this section shall be filed immediately with the commission.

Ohio Public Utilities Commission Rules

§ 4909.19 Publication; Investigation.

Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish the substance and prayer of such application, in a form approved by the

public utilities commission, once a week for three consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and affected by the matters referred to in said application, and the commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, a copy of which shall be sent by registered mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The commission may grant continuances for a longer period than three days upon its order for good

cause shown. At any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.

§ 4904.191

(A) Each electric light company shall, at the time of the hearing required by the division (B) of section 4905.301 [4905.30.1] of the Revised Code, file proof that notice of the hearing has been published for five consecutive days ending the day preceding the hearing in at least one daily newspaper in general circulation in each county in which the company operates and which is affected by the matters referred to in the hearing notice. The hearing notice shall not appear in the legal notices section of the newspaper and shall be printed in a type size larger than agate. In addition, where its charges for fuel, expressed in terms of cents per kilowatt hour, to any class of its customers exceed by fifteen per cent or more the charges for fuel established at the last hearing on its fuel cost adjustment clause, the electric light company shall, at least thirty days prior to the next scheduled hearing on its fuel cost adjustment clause, notify its customers on the bill or by bill insert of the scheduled hearing. The public utilities commission shall determine a uniform format for the content of all notices required under this division.

4909:1-11-10 Hearing.

(A) Time.

(1) Each electric utility shall be subject to a public hearing once in every six months for commission consideration of those matters set forth in paragraph (B) of this rule.

(2) A public hearing may be held at a lesser interval of time as ordered by the commission, upon its own mo-

tion or upon application of the electric utility or any other interested party, if changes in acquisition and delivery costs or in system operating characteristics arise which cause or may be reasonably anticipated to cause at least a twenty per cent increase or decrease in the fuel component. The commission shall issue an appropriate order within forty-five days after the date such an application is filed.

(B) Scope.

The electric utility shall demonstrate at its EFC hearing that its acquisition and delivery costs were fair, just, and reasonable. The commission shall consider, to the extent applicable:

(1) The efficiency of the electric utility's fuel procurement practices and policies;

(2) The results of the management/performance audit;

(3) The results of the financial audit;

(4) Compliance by the electric utility with previous commission performance recommendations; and

(5) Such other factors as the commission considers appropriate, including, but not limited to:

(a) Determination of the EFC rate to be charged by the electric utility during the next current period; and

(b) Calculation of the cost effectiveness measure under "Appendix A" to this chaper.

(C) Notice.

Each electric utility shall cause notice of its semiannual EFC hearing to be published and shall file proof of publication in accordance with division (A) of section 4909.191 of the Revised Code. In addition to the requirements of that section, each electric utility shall cause the same hearing notice to be published once between fifteen

and thirty days prior to the hearing date. The hearing notice shall comply with the uniform format for form and content determined by the commission.

Oklahoma Statutes, Title 17

§ 254. Disclosure in Customer Bills.

Each public utility subject to a fuel adjustment clause shall separately disclose in its customer bills the per unit cost of its fuel, purchased power or purchased gas adjustment. Upon request by any individual customer, such utility shall also disclose for the month for which the request is received:

1. The actual amount of the adjustment in dollars and cents; and

2. The per unit rate and amount thereof in dollars and cents of fuel, purchased power or purchased gas included in its basic rate.

Oklahoma Corporation Commission Electric Rules

Rule 35. Information on Bills.

The utility shall bill each consumer as promptly as possible following the reading of his meter. The bill shall show:

(A) The reading of the meter at the end of the period for which the bill is rendered.

(B) The date on which the meter was read, or the end of the billing period.

(C) The number and kind of units used for billing.

(D) The total amount due for electricity used.

(E) Items of tax separately billed, pursuant to Rule 55.

(F) The date by which the consumer must pay the bill in order to avoid addition of a penalty.

(G) The total amount due after addition of any penalty for nonpayment within a designated period. The terms "gross bill" and "net bill" or other similar terms implying the granting of a discount for prompt payment shall not be used where a penalty is added for nonpayment within a designated period.

(H) A distinct marking to identify an estimated bill.

(I) If there is a conversion from meter reading units to billing units, or any calculation to determine billing units from recording or other devices, or any other factors used in determining the bill, full information shall be furnished on request.

(J) In the case of a special form of billing, such as a level payment plan, any of the above information which is inappropriate may be omitted.

(K) The fuel adjustment or purchased power adjustment factor associated with the respective clauses on the consumer's bill.

(L) The electric bill submitted by the utility furnishing electric service to the consumer shall be allocated to the party(ies) affected by such consumer submeters in a manner approved by and on file with the Commission's Director, Public Utility Division.

Oregon: Initiative Measure #3 (enacted Nov. 6, 1984)

Be It Enacted by the People of the State of Oregon:

SECTION 1. The people of the State of Oregon hereby find that utility consumers need an effective advocate to assure that public policies affecting the quality and price of utility services reflect their needs and interests, that utility consumers have the right to form an organization which will represent their interests before legislative, administrative and judicial bodies, and that utility consumers need a convenient manner of contributing to the funding of such an organization so that it can advocate forcefully and vigorously on their behalf concerning all matters of public policy affecting their health, welfare and economic well-being.

SECTION 2. As used in this Act, except as otherwise specifically provided or unless the context requires otherwise:

(1) "Board" means the Citizens' Utility Board of Governors.

SECTION 10. (1) Upon request by the Citizens' Utility Board pursuant to this section, each utility shall include in billings to a utility consumer materials prepared and furnished by the Citizens' Utility Board, not exceeding in folded size the dimensions of the envelope customarily used by such utility to send billings to its customers.

(2) The Citizens' Utility Board shall not intentionally make any false material statement in any material submitted to a utility for inclusion with a billing. If the utility believes that the Citizens' Utility Board has intentionally made false material statements in an enclosure, it may file a complaint with the Public Utility Commissioner of Oregon within five days of receipt. The Public Utility Commissioner of Oregon must review the complaint within ten days, and if the Commissioner determines that the Citizens' Utility Board has intentionally made false material statements, the commissioner shall give the Citizens' Utility Board of Governors written notification that specifies any false material statements made and the reasons why the Commissioner determines the statements to be false.

(3) No utility shall be required to enclose Citizens' Utility Board material with a billing more than six times in any calendar year.

(4) The Citizens' Utility Board shall notify a utility of its intention to include under the provisions of this Act any materials in any specified periodic billing or billings not fewer than 30 calendar days prior to the mailing of the periodic billings and shall supply the utility with the material not fewer than 20 calendar days prior to the mailing of the periodic billings.

(5) All material submitted by the Citizens' Utility Board for inclusion in a utility billing must include the return address of the Citizens' Utility Board. A utility is not required to deliver or forward to the Citizens' Utility Board material intended for the Citizens' Utility Board mistakenly sent to the utility. However, a utility shall retain such materials for a period of 60 days from the date of receipt. The utility shall notify the Citizens' Utility Board that such materials have been received and make these materials available to the Citizens' Utility Board on demand.

Section 11. (1) The Citizens' Utility Board shall not be required to pay any postage charges for materials submitted by the Citizens' Utility Board for inclusion in a utility billing if such materials weigh four-tenths of one ounce avoirdupois or less. If the materials submitted weigh over four-tenths of one ounce avoirdupois, then the Citizens' Utility Board shall reimburse the utility for a portion of the postage costs which is equal to that portion of the Citizens' Utility Board material over four-tenths of one ounce avoirdupois in proportion to the total weight of the billing. In addition to postage costs, the Citizins' Utility Board shall reimburse such other reasonable costs, as determined by the Public Utility Commissioner of Oregon, incurred by a utility in complying with section 10 of this Act.

(2) Reimbursement of a utility by the Citizens' Utility Board shall be made within 60 days of the date of utility submits to the Citizens' Utility Board an itemized state-

ment of the costs incurred by the utility. In no event shall such reimbursement exceed the fair market value for the services provided by the utility.

South Carolina Code of Laws 1976, Vol. 26

Public Service Commission Regulations Pertaining to Utilities

Reg. 103-330. Customer Information.

Each electrical utility shall:

a. Maintain up-to-date maps, plans, or records of its entire transmission and distribution systems, with such other information as may be necessary to enable the electrical utility to advise prospective customers, and others entitled to the information, as to the facilities available for serving customers within its operating area.

b. Provide to each new residential and small commercial customer, within 60 days of application for service, a clear and concise explanation of the available rate schedules for the class of service for which the customer makes application for service.

c. Provide to each residential and small commercial customer to whom more than one rate schedule is reasonably available a clear and concise summary of the existing rate schedules applicable to the customer's class of service at least once a year.

d. Notify each affected customer of any proposed adjustment in rates and charges, excluding adjustment of base rates for fuel costs within sixty (60) days of the date of the filing of such adjustment or as otherwise directed by the Commission.

e. Provide to each customer, upon request, a clear and concise statement of the actual consumption of electrical energy by such customer for the previous twelve (12) months.

Reg. 103-430 Customer Information.

Each gas utility shall:

a. Maintain up-to-date maps, plans or records of its entire transmission and distribution systems, with such other information as may be necessary to enable the gas utility to advise prospective customers, and others entitled to the information, as to the facilities available for serving customers within its operating area.

b. Notify each affected customer, in writing, as prescribed by this Commission, of any proposed change in rates and charges within 45 days of the gas utility's filing of such proposad change with the Commission. Unless the Commission orders otherwise, this notice requirement shall not apply to Purchased Gas Adjustments, Curtailment Adjustments and Exploration Adjustments. Certification that the above notice requirement has been met shall be furnished the Commission by the gas utility.

Washington Administrative Code

WAC 480-80-125 Notice by Utility to Customers Concerning Hearing. The purpose of this requirement is to ensure that customers of a utility which is proposing a rate increase receive reasonable notice of the nature and the magnitude of the proposed increase, so that the customer is able reasonably to make an informed decision about whether to participate in the hearing process.

(1) Whenever any utility proposes to increase any rate or charge for the service or commodities furnished by it, and the commission has issued an order instituting investigation concerning such increase, the utility shall supply a statement to such customers or classes of customers designated in the order instituting investigation

that a hearing will be held by the commission at which members of the public will be afforded an opportunity to testify. The statement shall also set forth the amount of the proposed increase expressed in (a) total dollars and average percentage terms, and (b) the average monthly increases that customers in each category or subcategory of service might reasonably expect. Categories of service shall be identified in tariff terms, and if those terms are different from those commonly used by the utility or understood by customers, the notice shall incorporate that commonly used or understood terminology. The notice shall further contain the information that a public counsel will be appointed to represent the public and the mailing address of the commission to which any customer inquiries to the commission or to the public counsel relative to the public hearing date may be directed. The statement shall accompany, as a separate document, regular bills distributed by the utility to its customers, starting with the first billing cycle reasonably available following issuance of the commission's order instituting investigation and continuing throughout the utility's billing cycle covering customers of the utility as of the date of the commission's order instituting investigation. As an alternative the utility may make a separate distribution of the statement within thirty days following the date of the issuance of the order instituting investigation. Whether disseminated as part of a regular billing or separately the notice shall be prepared in such a manner as to attract attention to it and to distinguish it from other material simultaneously distributed. A copy of such statement shall also be mailed or delivered to at least one newspaper of general circulation, and at least one radio and at least one television station, in the area or each of the areas affected. The utility shall promptly file a copy of the statement with the commission and certify it has complied with or is in the process of complying with these mailing and delivery requirements.

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No. 84-1044

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF CALIFORNIA

BRIEF OF THE STATE OF WISCONSIN AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The Wisconsin Legislature by the enactment of Wis. Stats. ch. 199,[1/]

1/ The Citizens Utility Board Act, ch. 72, 1979 Wis. Laws 457.

effective November 29, 1979, chose to facilitate consumer involvement in the utility regulatory process through the creation of a new public entity, the Wisconsin Citizens Utility Board (hereinafter "Wisconsin CUB"). The Wisconsin CUB was created as a "nonprofit public body corporate and politic" Wis. Stats. sec. 199.04(1)(1983-84) with the explicit intent that it represent consumer interests in utility proceedings.

> The purpose of this chapter is to promote the health, welfare and prosperity of all citizens of the state by ensuring effective and democratic representation of individual farmers and other individual residential utility consumers before regulatory agencies, the legislature and other public bodies and by providing for consumer education on utility service costs and on benefits and methods of energy conservation. Such purpose shall be deemed a statewide interest and

> not a private or special concern.

Wis. Stats. sec. 199.02(1983-84).

> The corporation shall:
>
> a. Represent and protect the interests of the residential utility consumers of the state. All actions by the corporation under this chapter shall be directed toward such duty.
>
> b. Inform, insofar as possible, all residential utility consumers about the corporation, including the procedure for obtaining membership in the corporation.
>
> c. Make available to all residential utility consumers information on utility service costs and on benefits and methods of energy conservation.

Wis. Stats. sec. 199.05(1)(1983-84).

The Wisconsin CUB is authorized to intervene as a party in regulatory proceedings and to represent consumer interests before legislative and other public bodies, Wis. Stats. sec.

199.05(2)(d)(e)(1983-84). The organization is governed by a Board of Directors with the requirement that there be two directors from each congressional district, Wis. Stats. sec. 199.06(1983-84). Directors are nominated and elected by membership in a procedure specified by law, Wis. Stats. sec. 199.12(1983-84). Every Wisconsin adult residential utility consumer is eligible for membership in the Wisconsin CUB and funding is to be provided through membership fees and donations, Wis. Stats. sec. 199.04(1) and 199.05(2)(c)(1983-84).

The Legislature has provided that information describing the "purpose, nature and activities" of the Wisconsin CUB is to be distributed in periodic utility billings. The Wisconsin CUB enclosure may solicit contributions but may not have the character of a bill,

statement of account or personal correspondence, Wis. Stats. sec. 199.10(1)(d)(1983-84). No utility may be required to distribute such material more than twice per year and the material must be provided to the utility not less than 21 calendar days before the billing cycle, Wis. Stats. sec. 199.10(1)(a) and (2)(b)(1983-84).

The enclosure material must be compatable with the utility's mail envelope and may not exceed one half ounce in total weight, Wis. Stats. sec. 199.10(1)(b)(1983-84). In the event that the enclosure causes the total weight of the utility billing to exceed one ounce, the Wisconsin CUB is required to reimburse the utility for mailing cost in proportion to the weight of its enclosure. Moreover, the Wisconsin CUB is obligated to reimburse the utility

with interest for any reasonable costs incurred above the utility's normal mailing costs, Wis. Stats. sec. 199.10(3)(1983-84).

The enclosure must be submitted in advance for approval by the Wisconsin Public Service Commission (hereinafter "Wisconsin PSC") to assure that it is not false or misleading, Wis. Stats. sec. 199.10(2m)(1983-84).

The Wisconsin CUB, over the past five years, has grown to over 118,000 members and has become an active participant in the Wisconsin regulatory process. In 1984 the Wisconsin CUB participated in 27 regulatory proceedings

before the Wisconsin PSC[2/] and three circuit court actions.[3/]

2/ Wisconsin Bell refund, Dkt. 6720-TI-3; Usage Sensitive Service, Dkt. 2180-TR-18; Access charges, Dkt. 05-TR-5; Wisconsin Bell Yellow Pages, Dkt. 6720-AT-6; Party Line, Dkt. 6720-TA-100; Cost-of-Service Study, Dkt. 05-TI-8; Regulatory Authority, Telecommunications, Dkt. 05-TI-100; Post-Divestiture Inquiry, Dkt. 05-TI-6; Local Disconnection, Dkt. 1-AC-101; Mobile Unit Access Charges, Dkt. 05-TR-4; MCI Authority, Dkt. 3258-NC-1; Wisconsin Power & Light, Rates, Dkt. 6680-UR-14; Wisconsin Power & Light, Fuel Costs, Dkt. 6680-UR-15; Wisconsin Electric Power, Rates, Dkt. 6630-ER-19; Wisconsin Public Service, Rates, Dkt. 6690-UR-20; Wisconsin Public Service, Cogeneration, Dkt. 6690-DR-100; Wisconsin Gas, Rates, Dkt. 6650-GR-19; Wisconsin Natural Gas, Rates, Dkt. 6670-GR-11; Madison Gas & Electric, Rates, 3270-UR-13; Electric Load Growth, Dkt. 05-EI-15; Cost of Fuel, Dkt. 1-AC-59; Cold Weather Disconnection, Dkt. 1-AC-29; Early Identification Programs, Dkt. 05-UI-17; Mandatory Budget Billing, Dkt. 1-AC-62; Rental Living Unit Seal, Dkt. 6650-UC-1; Holding Company Investigation, Dkt. 05-UI-18 and 6650-DR-2; Utility Advertising Rules, Dkt. 1-AC-60.

3/ CUB v. PSCW, Dane Cty. Cir. Ct., Case Nos. 84-CV-0314, 84-CV-0315 and 84-CV-0316; CUB v. PSCW, et al., Dane Cty. Cir. Ct. Case No. 84-CV-4243; Northeast Telephone Co., et al. v. PSCW, (Footnote continued)

The Wisconsin PSC has historically regulated closely the process by which each utility bills its ratepayers. The form and content of each billing is specified in great detail in the Wisconsin Administrative Code, Wis. Adm. Code, sec. PSC 113.16 (electric), sec. 134.13 (gas) and sec. 165.05 (telephone). Wisconsin law also requires that any utility which applies for a general rate increase must provide through its billing process notice of the application to all affected customers together with an explanation of its general effect, Wis. Adm. Code, sec. PSC 2.73. Finally, the WPSC has never hesitated to use this readily available, ratepayer-funded means of communication to disseminate useful information related

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et al., Brown Cty. Cir. Ct., Case No. 84-CV-2793.

to the regulatory process generally. Recent examples include information relating to disconnection procedures, budget billing and procedures for disputing a bill.

This appeal is a challenge to an order of the California Public Utility Commission (hereinafter "CPUC") which authorized a consumer organization to distribute information relating to the group's participation in the regulatory process using the periodic billings of the appellant utility. Amici Wisconsin State Telephone Association and Wisconsin Bell, Inc. (hereinafter "WSTA") have suggested that this appeal challenges in substance the Wisconsin statute that expressly authorizes periodic distribution of consumer information on behalf of the Wisconsin CUB. The result advocated by the appellant would diminish

substantially the ability of a state regulatory commission to regulate the relationship between a utility monopoly and its ratepayers. It would seriously impair the ability of a commission to facilitate consumer participation in its own legal process. Similarly, the arguments offered by WSTA represent an effort to reduce significantly the power of a state legislature to encourage participation on the part of consumers in the regulatory process. The State of Wisconsin appears amicus curiae in support of the CPUC to urge that this challenge to fundamental state sovereignty be rejected.

SUMMARY OF ARGUMENT

The promotion of consumer participation in the regulatory process is a proper and substantial state

interest. The order of the CPUC is a proper exercise of state authority to promote effective consumer participation. The order properly makes limited use of the utility billing mechanism simply to assure that an additional voice is heard but does not infringe upon the utility's ability to communicate with rate-payers.

ARGUMENT

I. An Intervenor Organization Which Participates In The Regulatory Process On Behalf Of Consumers Performs A Valuable Public Function.

Public utilities are subject to comprehensive regulatory control and, in turn, enjoy exclusive franchise to provide utility service within designated areas. Each public utility is truly a state-created monopoly and the reality is that virtually every residential consumer

has no choice but to purchase each utility service from a single source. The rationale for utility regulation is the need to protect rate-payers who must deal with a monopoly utility for vital service, Consolidated Edison v. Public Service Commission, 447 U.S. 530, 549-550 (1980).

Utility rate setting before the CPUC involves a complex proceeding in which interested parties have the right to present evidence and argument. Cal. Pub. Util. Code, sec. 1705. The primary purpose of the utility regulation is the protection of public Sale v. Railroad Commission (1940), 15 Cal. 2d 612, 104 P.2d 38 but the commission risks a violation of due process if it fails to maintain an impartial demeanor in that process, Morgan v. United States, 304 U.S. 1, 22 (1937). There exists a

dichotomy in that a state may properly seek to protect ratepayers from exploitation by utility monopolies but a regulatory commission must maintain an essentially neutral posture as the decision maker in an adversarial hearing.

Certainly residential ratepayers share a vital stake in the decisions that are made before a state regulatory commission. There is, however, little or no real opportunity for individual consumers to play a meaningful role in such a proceeding. The TURN organization provides to prospective members an opportunity to participate in the regulatory process and in so doing it assists the commission in discharging its public responsibilities. The CPUC has determined TURN's participation to be of real value.

> TURN has demonstrated in its testimony and in its past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population.
>
> There is no question that participation by representatives of consumer groups tends to enhance the record of our proceedings.

CPUC Decision No. 83-12-047 (A-19).

> 29. Participation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff.

CPUC Decision No. 83-12-047, Findings of Fact (A-36).

The foregoing determination by the California PUC is the full equivalent to the determination by the Wisconsin legislature that the activities of the Wisconsin CUB serve a public, state-wide purpose, Wis. Stats. sec. 199.02.

Active representation of residential consumers at hearing provides balance and contributes additional information to assist the Commission in reaching its decision. Perhaps of equal significance is the liklihood that independent, vigorous representation of consumer interests will enhance public perception that both sides of a rate question are indeed being fairly considered in the regulatory process. The Wisconsin CUB is a public entity intended to serve a specific public role in the regulatory process. The TURN organization, in its advocacy before the CPUC, fills a substantially parallel role that is truly public in character.

II. The Use Of The Utility Billing Mechanism To Distribute Consumer Information Relating To The Regulatory Process Is A Reasonble, Proper Way To Facilitate Consumer Participation In That Process.

Utility regulation is intended to monitor and to control the non-market relationship between the public utility and its rate payers. The periodic utility billing is an integral part of the service provided by each utility. This regular contact between the utility and its customers has long been subject to careful control by the CPUC and has often been used to communicate useful information of public significance to rate-payers including notice of Commission proceedings (Motion to Dismiss, at 11 and A-7).

Just as TURN and the Wisconsin CUB each represent an opportunity for consumers to participate in the regulatory process, the billing envelope offers the most direct and effective means of communicating with utility customers. Clearly a customer's interest and concern about utility matters will rarely be greater than at the moment that the demand for payment is received. Indeed, one Wisconsin utility has conducted a survey which demonstrated the bill enclosure to have been far and away the most effective method of

communicating an energy conservation message.[4/]

The bill enclosure has long been used to communicate regulatory information beyond the basic demand for payment. Materials that have been included in billings, certainly notices of rate increases and hearings, were clearly intended to facilitate consumer awareness and participation. If a

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4/ The Madison Gas & Electric Company conducted a survey to identify the proportion of customers who could recall seeing MG&E energy conservation advertising and, if so, to identify the medium of communication. The rates of positive response, by media, were as follows:

Newspaper	41%
Radio	32%
Television	68%
Bill Stuffer	81%

MG&E Customer Conservation Survey Report, October, 1983

distinction can be drawn between the previous use of the billing enclosure and its use by intervenor groups, it is that the use now in question appears to bring forth effective consumer participation as a fact rather than as a theoretical possibility.

The CPUC by order, and the Wisconsin Legislature by statute, have done no more than make limited, reasonable use of The most obvious, direct and efficient means to invite consumer involvement in the legal process where consumer interests are directly at stake.

III. The Distribution Of Wisconsin CUB Information Through The Billing Envelope Has Been An Accepted Part Of The Wisconsin Regulatory Process For Five And One Half Years.

Wisconsin utilities have been operating under the requirement to

distribute Wisconsin CUB information since November 29, 1979. WSTA is therefore entirely correct in saying that Wisconsin utilities have had considerable experience in the actual operation of the statutorily authorized distribution of intervenor materials (Brief, p. 4). The fact is, however, that this limited distribution of additional information has caused no particular difficulty during that period. It is true that WSTA, after this Court noted probable jurisdiction in this appeal, filed an action claiming that the distribution

requirement is in violation of the First Amendment.[5/] It is equally true,

---

5/ Wisconsin State Telephone Ass'n et al. v. Citizens Utility Board, U.S. District Court, Case No. 85-C-0821 (E.D. Wis. filed May 30, 1985). The WSTA suggests in its newly filed lawsuit that an informal communication by Chairman Flores of the Wisconsin PSC has inhibited utilities from responding to Wisconsin CUB enclosures. Wisconsin Bell, Inc. has never been reluctant to defend its prerogatives and the current efforts to do so exemplify the "hardy" quality of commercial speech, Central Hudson Gas v. PSC, 447 U.S. 557, 564 n. 6 (1980). Moreover, Wisconsin utilities have continued to insert responses to Wisconsin CUB enclosures. Wisconsin Electric Power Company, billing cycle beginning April 15, 1985; Wisconsin Power & Light, billing cycle beginning May 13, 1985.

however, that Wisconsin Bell and every other utility subject to the statute saw no need to challenge the law until now.[6/] One might infer from the timing of the recent lawsuit that it is primarily intended to obscure the fact that the statute in question has from its creation been accepted as a reasonable part of the Wisconsin regulatory process.

6/ There has been only a single lawsuit filed based upon the Wisconsin Citizens Utility Board Act other than the recent challenge noted above. In Citizens Utility Board v. Wisconsin Bell, Inc., Case No. 84-CV-4693, the Dane County Circuit Court granted summary judgment for the Wisconsin Bell Inc. on June 13, 1985 directing the Wisconsin CUB to pay the sum of $2,017.04 as proportional mailing costs pursuant to Wis. Stats. sec. 199.10(3)(1983-84).

IV. The Appellant Seeks To Diminish The Authority Of A State To Define The Legal Process By Which Utilities Are Regulated.

The CPUC has not impaired the ability of PG&E to communicate its message in the billing envelope. Clearly, PG&E has the right to provide its Progress publication to its customers in any and every monthly billing. It is PG&E that demands to exclude from this means of communication information that the Commission has determined will assist in the regulatory process. PG&E argues that its right to speak to customers should be permitted to swell into a perogative to exclude speech of others. To accept this claim is to undercut the fundamental authority of a state commission to regulate the relationship between a monopoly utility and its captive ratepayers. To accept the claim

when the communication in question is one that the CPUC has determined to be an aid to its regulatory decision-making is to permit a profound diminution of the state's authority to promote full participation within its own regulatory process.

PG&E asserts that it is "highly likely that the public will receive a mistaken impression that the state's selection of TURN to send its message in the billing envelope is supported by PG&E" (Brief at 19). This court in Pruneyard Shopping Center v. Robins, (1980) 447 U.S. 74, recognized that a simple disclaimer would be entirely adequate to resolve this problem in the context of a public shopping center, at 87. Here, the CPUC order resolves any problem by explicitly requiring TURN to include the disclaimer as part of its

disclosure (CPUC Decision, Order 5(e), Motion to Dismiss, App. A-39). In any event, the Wisconsin CUB enclosures which appear in the appendix of WSTA make clear the improbability of any confusion (WSTA, App. 7-a to 18-a). These enclosures are obviously statements of advocacy. No individual sufficiently interested to read them could be left with the impression that they were endorsed by any utility.

A basic premise underlying the PG&E argument is the idea that its relationship with its ratepayers is no different than any other commercial dealing. In fact it is a non-market relationship that has long been subject to extensive state regulatory control. PG&E describes TURN as a private entity (Brief at 14 n. 12) while WSTA describes TURN as a "professional intervenor"

(Brief at 10). Both characterizations fail to recognize the public character of TURN's participation before the CPUC. The Commission has determined that TURN's involvement benefits both ratepayers and the Commission itself. The TURN enclosure is but the initial element in a process which the CPUC has determined will promote greater participation and more complete consideration of issues at hearing. The enclosure serves a significant public purpose and the California order is squarely within the scope of traditional state authority.

CONCLUSION

This Court should affirm the judgment of the California Supreme Court

affirming the CPUC's decision number 83-12-047.

Respectfully submitted,

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On Appeal From The Supreme Court Of California

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No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,
Appellees.

On Appeal From The Supreme Court Of California

BRIEF OF THE STATE OF ILLINOIS AND THE ILLINOIS CITIZENS UTILITY BOARD, AS AMICI CURIAE URGING AFFIRMANCE

The State of Illinois submits this brief in support of appellees in accordance with Rule 36.4 of the Rules of this Court. The Illinois Citizens Utility Board has received the written consent of all parties to its participation and has filed its letters of consent with the Clerk of this Court.

INTERESTS OF AMICI

The State of Illinois, as representative of the People of Illinois, has a strong public policy interest in the outcome of this case. Illinois seeks to assure that the States have the opportunity to explore and experiment with methods that assure that utility rate-making bodies can gather sufficient information at rate hearings to enable them to set just and reasonable rates. The Illinois General Assembly has determined that one effective method for assuring a complete presentation of facts to the Illinois Commerce Commission is through active participation of the Illinois Citizens Utility Board (Illinois CUB) in educating the citizens of Illinois and in representing their interest in rate hearings. In light of these legislative determinations, the Illinois General Assembly established Illinois CUB by statute enacted in 1983.

Illinois CUB is a nonprofit public body corporate and politic made up of residential utility consumers who voluntarily submit membership applications and contribute dues. Illinois CUB sustains itself through these dues alone. Membership is solicited, pursuant to statute, through envelope enclosures or by means of postcard statements mailed by public utilities along with their regular billings.

The Illinois statutory scheme has been a definite success. In operation for one year, this scheme has not created any substantial difficulties for utilities or impeded their own communications with customers. Moreover, CUB has contributed in a significant way to make rate hearings and other legislative activities more balanced and to promote the setting of fair and reasonable utility rates in Illinois.

We support the position of the Appellees in this matter and believe that information about the operation of the Illinois legislative scheme will assist this Court in evaluating the assertions made by Pacific Gas and Electric Company. In addition, we support and adopt the arguments presented in the Brief of New York Citizens' Utility Board, Inc. and Utility Consumers' Action Network as Amici Curiae Urging Affirmance.

SUMMARY OF ARGUMENT

The Illinois Citizens Utility Board was created by the state legislature, in the exercise of its police power, to educate consumers on utility issues and to enhance the rate-making process by providing utility regulators with residential ratepayers' viewpoints concerning just and reasonable rates. Illinois CUB has now operated successfully for a full year, without causing confusion to utility consumers or impeding the speech of the utilities who have included CUB's mailings with their regular billing. Both CUB messages and utility messages have been enclosed in the same billing envelopes.

ARGUMENT

THE MAILING PROCEDURE UTILIZED BY THE ILLINOIS CITIZENS UTILITY BOARD HAS NOT IMPAIRED UTILITY SPEECH IN ANY WAY

In 1983, the Illinois General Assembly recognized a fundamental imbalance in the participation in public utility regulation, especially presentations to the Illinois Commerce Commission (ICC) in rate hearings. The ICC has a statutory obligation to fairly balance the interests of utility shareholders in a reasonable return on their investment and the rights of the consumers to affordable rates and reliable service. Illinois Public Utilities Act, Ill. Rev. Stat., ch. 111⅔, ¶¶ 32, 36 (1984 Cumm. Supp.); *Village of Monsanto v. Touchette*, 63 Ill. App. 2d 390, 211 N.E.2d 471 (5th Dist. 1965).

Illinois utilities have historically been able to devote substantial financial resources to marshall evidence, experts, and detailed arguments before the ICC.[1] Conversely, residential ratepayers had not marshalled their resources, and had scant opportunity to disseminate information and secure adequate representation. As a result, Illinois citizens raised significant questions concerning the fairness of rate decisions. Utility rate hikes became a matter of substantial public concern.

Due to the public perception that rate-making decisions were skewed in favor of utilities, democratic pressures

[1] For example, Commonwealth Edison reports that in 1984 it spent $1,438,168 for expenses in connection with ICC litigation. Commonwealth Edison Annual Report to the Illinois Commerce Commission, Dec. 31, 1984, p. 350. These costs are treated as operating expenses and recovered through rates.

were asserted to correct that imbalance. The Citizens Utility Board Act was passed in direct response to this strongly felt need, to ensure "effective and democratic representation of utility consumers before the Illinois Commerce Commission . . . and other public bodies" and to provide "consumer education on utility service prices and on benefits and methods of energy conservation." Ill. Rev. Stat. ch. 111⅔, ¶ 902 (1984 Cumm. Supp.).

In its brief history, CUB has generated significant public support. From its first mailing in July 1984, CUB has acquired new members from all regions of the State at the rate of 25,000 each quarter. Its membership reached 110,000 participants by June 1985.

To date, CUB has intervened in four major ICC proceedings in order to provide the decision-makers with the residential ratepayers' viewpoints concerning just and reasonable utility rates. In response to the imminent expiration of the Illinois Public Utilities Act, which governs utility rates and services, CUB has also played a major role in the legislature's recent action to comprehensively revise Illinois public utility regulation.

Finally, through its newsletters and regular distribution of consumer fact sheets to its membership, CUB has helped to educate citizens on utility issues and, in particular, on ratepayers' rights. Thus even at this initial stage CUB is undeniably fulfilling the stated legislative intention to enhance consumer education on utility issues and to ensure that the ICC and other decision-makers are presented with a broader range of evidence for consideration in rate hearings.

Since July 1984, CUB has caused 16 million enclosures, and 6 million postcard messages, to be included in utility bills without any substantial problems or disputes with

Illinois utilities. The CUB enclosures do not resemble billings; they clearly disclaim any association with the utility company.[2] A sample CUB enclosure is contained at pages A. 5-6 in the Appendix to this brief. Moreover, in many cases, the utilities' bills or enclosures have explicitly disclaimed any responsibility for the CUB enclosures.

Illinois utilities have in no way been restricted in their efforts to communicate with their customers. Indeed, the enormous quantity of material often contained in a utility billing envelope belies many of the "horribles" suggested by those opposing the use of bill inserts by organizations such as Illinois CUB. For example, Peoples Gas Light & Coke Company's ("Peoples Gas") May 24, 1985 billing envelope included:

1) A one-page bill (not in the Appendix to this brief);
2) Peoples Gas' "Bulletin", a two-page newsletter printed on both sides of each page explaining the utility's views on rates and other matters (A. 1-4);
3) Illinois CUB's membership solicitation (one page, printed on both sides) (A. 5-6);
4) Three empty envelopes to return payment for future Peoples Gas bills (A. 7-9); and
5) The billing envelope itself, which has printed (on the reverse side) pictures and a message soliciting information about missing children (A. 10-11).

Included within the Peoples Gas publication, the Bulletin, are statutorily required notices. (See A. 3). As the billing envelope demonstrates, all of this material was sent for the pre-sorted postal rate of 17 cents per envelope (A. 10).

[2] The CUB statute provides that CUB's enclosures may not resemble billings. ¶ 909(3).

This mailing illustrates that the assertion by Pacific Gas and Electric Company ("PGE") and the other utilities that utility speech will have to be curtailed to accommodate TURN's mailings is groundless. Utility speech is, if anything, in overwhelming supply and readily co-exists with enclosures from consumer organizations, such as Illinois CUB. PGE is not seeking free speech; it is seeking subsidized speech to the exclusion of others.

Nothing in the California PUC ruling, and nothing in the Illinois statute, impedes utility speech to customers. Both states have merely required another form of notice. Public notices have long been required by many state and federal laws and have long been accepted by the utilities. For example, under federal law, electric utilities must disseminate rate schedules and proposed rate changes. These notices are frequently mailed with the utility bills. 16 U.S.C. § 2625(f). Illinois regulations require notices of charges, discontinuance of service notices, second language notices and, in the case of phone companies, specified directories. 83 Ill. Adm. Code §§ 280.130, 280.190, 735.70, 735.180, 735.220. A State-endorsed notice that consumers may participate in rate hearings through CUB or TURN is no more onerous and is directed to precisely the same goal—a well informed public. The States properly exercise their police power when they seek to assure that the public may participate in rate-making decisions through democratic efforts.

CONCLUSION

The order appealed should be affirmed.

Respectfully submitted,

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July 19, 1985

APPENDIX

CUSTOMERS INFORMATION
Bulletin
Peoples Gas
SPRING 1985

Good News:

GAS COSTS ARE LEVELING OFF

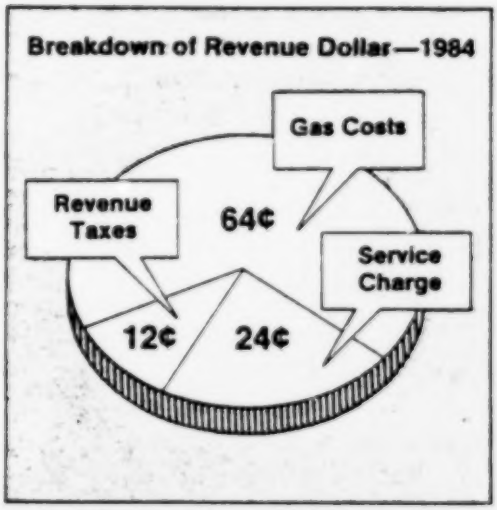
We are pleased to report that the cost of natural gas finally is leveling off after a long period of rapidly escalating prices. Fact is, if the last two winters hadn't been colder than normal, it's likely that you already would have noticed that prices have stabilized.

If weather were normal, the annual gas bill for an average Chicago dwelling at our current rates (May, 1985) would be only about 3.5 per cent higher than the bill for calendar 1983. Inflation, meanwhile, has totaled about 6 per cent since the end of 1983.

Our most recent survey of 30 major metropolitan cities shows that residential gas-heating costs in Chicago (before revenue taxes) rank far down the list in the 22nd spot, with Peoples Gas customers paying substantially less than their counterparts in major Eastern cities.

More good news: We do not plan to request a general rate increase from the Illinois Commerce Commission at least through the balance of this year, so rates covering our own operating costs will remain stable throughout all of 1986.

All of this news should provide welcome relief for consumers because the cost of gas we buy for delivery to you had been rising rapidly, due to regulations and policies set by the federal government in Washington. And these costs represent about 64 per cent of our total revenues. (See Chart.)



Another portion — 12 per cent — results from revenue taxes levied by the State of Illinois and the City of Chicago. The remaining portion of our revenues represents the "Service Charge" approved by the Illinois Commerce Commission in rate cases. Included in this Charge are such things as payroll costs, uncollectable accounts, property and income taxes,depreciation, interest expenses, and a profit of about four cents out of each dollar on your bill.

When we do file for a rate increase, proceedings before the Commission are handled by two or three members of our own legal staff. We do not hire outside attorneys for such cases. Most evidence supporting our request is provided by company personnel,

(Continued, next page)

Good News *(Continued)*

with some testimony given by outside experts.

Typically in our rate cases, the Commission's staff has legal counsel and other attorneys are present to represent numerous intervenors from the public and private sectors, including community groups, industrial organizations, and state, county, and city governments.

We've been working hard to bring about some meaningful reductions in the cost of gas purchased for delivery to you, while keeping our own costs under control. For instance, we've been actively trying to improve federal gas laws and regulations, encouraging more competition among pipeline suppliers, and buying some gas directly from a producer. These efforts are starting to pay off and we are seeing notable improvements at last.

We join with our customers in welcoming this relief. Hopefully, gas prices will remain fairly stable and those large increases will be a thing of the past.

Need money to weatherize your property?

A Chicago Energy Savers Fund low-cost loan might help!

Find out if you're eligible—
Owners of 1- to 4-flat buildings, call:
Neighborhood Housing Service (NHS) 454-0756
Owners or managers of 5- to 49-Flat or low-rise buildings, call:
Community Investment Corporation (CIC) 341-0070
Both phones in service Mon.-Fri., 9:00 A.M.—5:00 P.M.

Building Size	Interest Rates	Loan Limits
Single Family Home	6-8%	$500 to $3,000
2- Flat Building	6-8%	$500 to $6,000
3- or 4-Flat Building	6-8%	$500 to $8,000
5- to 49-Flat Low-rise	8%	$3,000 maximum per unit, up to $98,000 per building. Minimum loan of $5,000

NOTE: Program terms and conditions subject to change without notice.

Customers who receive an energy conservation loan for heating equipment under the Chicago Energy Savers Fund will not be eligible to participate in the Peoples Gas Incentive Program.

New downtown site for our Customer Service Area

One condition of the recent sale of the 122 South Michigan Avenue Building (formerly Peoples Gas Building) was that the gas company vacate its lobby offices. To maintain a convenient downtown business office for our customers, the company has rented space at the southeast corner of State and Van Buren (the former Sears store).

Convenient to public transportation, this office will provide full service. Our customers will be able to pay gas bills, apply for service and discuss gas business matters with the Account Representatives on our staff.

An added feature will be our new "Gas Energy Conservation and Education Center." Here, interesting exhibits will display information about the gas industry plus valuable tips on how consumers can save on their use of gas energy.

This new office is scheduled to open on or about May 13th.

Budget Payment Plan accounts now earn 9.5% interest

On Sept. 5, 1984 a feature was added to our Budget Payment Plan that provides customers another excellent benefit. Under this new feature, the company pays interest on the daily credit balances of these accounts. The annual rate of interest paid has been established by the Illinois Commerce Commission and is the same rate the company pays on customers' deposits. The present rate is 9.5%.

Other good reasons customers join the Plan include: avoiding high gas payments during the heating season, knowing in advance how much their monthly bills will be, and being able to logically plan their household energy expenses.

The Budget Plan is designed to level off a customer's gas bills by spreading them out over the entire year into equal monthly payments. We first estimate the total cost of a customer's gas usage for the coming year, assuming normal weather. That total is then divided by 12 to establish the equal monthly billing amounts.

Budget accounts are reviewed in January or February and adjusted, when necessary, to reflect any changes in gas consumption or in the price of natural gas.

The Budget Plan year for your billing district begins next month. To join the Budget Payment Plan or for more information, call an Account Representative at 431-7004.

Add-A-Dollar help still needed

In the wake of last winter's frigid weather, some of our needy customers have fallen behind in their gas bill payments.

The gas company maintains Add-A-Dollar, a matching gift fund, to provide financial assistance for those customers. We will match contributions up to a total of $250,000.

The Salvation Army picks the customers to be granted up to $200.

Through March, we have matched $79,041 in contributions.

We urge all, who can, to add one dollar to their monthly gas bill payments. These gifts are tax-deductible.

Larger gifts may be sent to: Add-A-Dollar/Salvation Army, P.O. BOX 8634, Chicago, IL 60680-8634.

If your employer contributes to worthy causes, why not suggest Add-A-Dollar.

NOTICE

In accordance with the requirements of Federal Law and the Federal Department of Energy, we are required to inform each residential customer using gas for outdoor lighting of the amount of gas consumed in the outdoor gas light.

An outdoor gas light typically consumes 180 therms of gas per year. Based upon our rates in effect on April 1, 1985, 180 therms of gas will cost $87 per year, exclusive of Additional Charges for State and Municipal Utility Taxes.

High efficiency incentive credits prove very popular

Many earn credits of $100 or $150

Nearly 700 applications for incentive credits have been approved for customers who have installed high efficiency gas central space heating equipment. This has been the response to a special high efficiency incentive program offered by the gas company since Oct. 15, 1984.

The program is designed to encourage customers to conserve on gas by using this new energy-efficient equipment. Following is a description of the program.

The seasonal efficiency of an average old gas furnace is only about 67%. To combat that problem, America's gas furnace and boiler manufacturers are making units with higher efficiencies than ever before. Some are as high as 96% efficient.

Now the law requires that all new furnaces and boilers be rated on the basis of test procedures established by the U.S. Government. These Annual Fuel Utilization Efficiency (AFUE) ratings make it easy for shoppers to determine which units will bring the best results for the fewest energy dollars.

The gas company offers incentives on gas units with AFUE ratings of 82% or higher. For those eligible, the company is offering credits on their gas bills for having such equipment installed on their properties in our service territory. A credit of $100 is allowed for equipment with ratings from 82 to 89%; a credit of $150 is allowed for units rated over 89%.

While this equipment is more expensive than conventional models, the incentive credit and annual savings on gas, ranging from 16 to 30%, assure the buyer a relatively short payback period.

So, before shopping for a new heating plant, call one of our Gas Utilization Representatives to learn more about our incentive program and to find out if you are eligible. Don't wait too long, however, because the company has reserved the right to withdraw the program at any time. North siders, call 794-6903; the number for South siders is 962-4922.

Before you dig—Call "DIGGER" (312) 744-7000

If you're planning any excavation work (other than simple surface digging), be sure to call "DIGGER" first. Gas lines or other underground utility facilities may be located in or near your work site.

To avoid a digging accident, call "DIGGER" at (312) 744-7000 to reach the Chicago Utility Alert Network. If we or any other network member have facilities in the area, personnel will be dispatched to mark their location for you.

The "DIGGER" line is in operation at all times, but it is best to give an advance notice of 48 hours or more. There is no charge for this service.

Finally...there's a way to fight back.

(this is *not* a message from the utility company)

CITIZENS UTILITY BOARD
P.O. Box 1104
Glenview, Illinois
60025

BUSINESS REPLY MAIL
FIRST CLASS PERMIT NO. 15404 CHICAGO, IL
POSTAGE WILL BE PAID BY ADDRESSEE

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

Your stamp helps us save money

Are you

FED UP

with skyrocketing utility bills?

Are you tired of hearing excuses?

MOISTEN AND FOLD LAST

Important Message from your Citizens Utility Board

DEAR FRIEND:

When your gas, electric, or telephone company wants to raise its rates, it rushes to the Illinois Commerce Commission with an army of high-priced lawyers and expensive consultants—the best money can buy. They can afford the best...because you pay for them.

That's one reason utility companies often get the rate increases they want!

Look at what's happened to gas bills. The average Illinois household with gas heat used 20% LESS gas in 1983 compared to 1979. However, rate increases made the average annual bill jump from $693 to $835. **That's a whopping 41% hike in a mere four years.**

Sometimes it makes you feel powerless.

But you can fight back. When you join the **Citizens Utility Board** you get a voice in rate increase hearings. **With your help, we will battle unnecessary rate increases before the ICC, in Springfield, and all the way to Washington.**

The **Citizens Utility Board** is a new organization of 75,000 of your Illinois neighbors who've joined together to oppose high rates and unfair utility policies that cost us all money.

We're not a government agency and we receive no tax dollars. Our members are utility customers just like you. We work together to provide a strong voice for consumers before the Illinois Commerce Commission and other government agencies.

CUB'S team of experts has only one mission—to fight for lower rates and better service.

Join **CUB** now. As a member, you will receive the latest information about the proposed rate increases. And you will be able to attend meetings of **CUB** members in your area and voice your concerns.

Most important, you will help to control runaway utility costs. You will be part of a powerful and growing organization that works overtime to keep utilities from taking more and more of your money.

Help make **CUB** work for you. Send your check or money order in this convenient mailer TODAY!

Sincerely,

Susan K. Stewart
CUB Administrative Director

YES! I want to fight back with CUB. Sign me up as a full voting member (minimum contribution $5 per member).

NAME (#1) _____ ENCLOSED IS: ☐$25

NAME (#2) _____ ☐$15

NAME (#3) _____ ☐$10

ADDRESS _____ $Other _____

CITY, STATE, ZIP _____ SEND YOUR CHECK OR MONEY ORDER DIRECTLY TO CUB—NOT TO YOUR UTILITY COMPANY.

PHONE( ) _____

Not paid for with tax dollars. Not paid for by any utility company.
Written and paid for by Cub, 59 East Van Buren, Suite 601, Chicago, IL 60605

FOLD SECOND

FOLD FIRST

FOLD SECOND

PUT STAMP HERE
POST OFFICE WILL NOT DELIVER MAIL WITHOUT POSTAGE

FROM _____

THE PEOPLES GAS LIGHT
AND COKE COMPANY
BILL PROCESSING CENTER
CHICAGO, ILLINOIS 60687-0001

FROM

PUT STAMP HERE POST OFFICE WILL NOT DELIVER MAIL WITHOUT POSTAGE

THE PEOPLES GAS LIGHT
AND COKE COMPANY
BILL PROCESSING CENTER
CHICAGO, ILLINOIS 60687-0001

A. 8

FROM

PUT STAMP HERE POST OFFICE WILL NOT DELIVER MAIL WITHOUT POSTAGE

THE PEOPLES GAS LIGHT
AND COKE COMPANY
BILL PROCESSING CENTER
CHICAGO, ILLINOIS 60687-0001

A. 9

Peoples Gas

The Peoples Gas Light
and Coke Company
122 South Michigan Avenue
Chicago, Illinois 60603

FIRST CLASS

CHICAGO
MAY 24 '85
ILL.

U.S. POSTAGE
.17
PB METER
5336001

A. 10

ENERGY:
USE IT WISELY





HAVE YOU SEEN THESE MISSING CHILDREN?

ANN GOTLIB
Female, white; 14 years' old
Height-5 ft.-1 in., weight-85 lbs.
Grey eyes, curly auburn hair
Abducted from Louisville, KY-
June 1983

MITCHELL D. OWENS
Male, black; 6 years' old
Height-3 ft., weight-40 lbs.
Brown eyes, black hair
Abducted from Menlo Park, CA-
February 1983

If you can identify these children or other missing children, call the National Center for Missing and Exploited Children at this toll-free number:

1-800-843-5678

A. 11

No. 84-1044 (49)

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE STATES OF CALIFORNIA, CONNECTICUT, INDIANA, LOUISIANA, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, RHODE ISLAND, TEXAS AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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No. 84-1044

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,
Appellees.

BRIEF OF THE STATES OF CALIFORNIA, CONNECTICUT, INDIANA, LOUISIANA, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, RHODE ISLAND, TEXAS AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICI

Amici are the States of California, Connecticut, Indiana, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Rhode Island, Texas and West Virginia. Public utilities, operating as monopolies, exist in our jurisdictions. They cannot exist

without State sanction, and having given such sanction, we have the responsibility to closely supervise and regulate these utilities to protect the public from monopolistic abuses. Each State must be free to exercise this power in a reasonable manner for the benefit of its citizens.

Appellant's brief challenges the ability of the State to issue reasonable orders it deems appropriate to enhance public awareness of and participation in the State's regulatory proceedings concerning public utilities by allowing ratepayer associations access to public utility billing envelopes. Such public participation can greatly assist the State in fulfilling its duties to assure efficient utility services at reasonable rates. We consequently appear as amici to protect our traditional police powers over public utilities.

SUMMARY OF ARGUMENT

American policy strongly disfavors monopolies. Public utilities can only operate as monopolies with State permission. Because of the inherent dangers that monopolies pose, public utilities are subject to strict State control. Pursuant to its traditional police powers, the State can issue orders authorizing ratepayer associations to insert their literature in the billing envelopes. Such orders can be properly made regardless of whether the "empty space" in the billing envelopes belongs to the public utility or to the ratepayers.

Requiring envelope sharing does not violate the public utility's right of free speech or free association under the First and Fourteenth Amendments. The challenged order neither compels nor prohibits PG&E's speech. PG&E remains free to enclose its literature in each monthly billing

envelope without restriction. Rigid disclosure requirements prevent the public from confusing ratepayers' literature for that of appellant.

The challenged order promotes the values of free speech by extending a voice to ratepayers. By encouraging ratepayers' speech, the public becomes better informed and more active in the regulatory process. Consequently, the State receives a broader spectrum of views, information, and proposals from its citizens. Thus, the State is able to regulate public utilities in a wiser and more equitable manner.

ARGUMENT

I.

THE STATE HAS THE POWER TO REASONABLY REGULATE THE USE OF BILLING ENVELOPES PURSUANT TO ITS POLICE POWERS OVER PUBLIC UTILITIES

A. Introduction

This case challenges the State's right and ability to regulate public utilities. Public utilities are state-created and regulated monopolies. Like most regulatory agencies, the California Public Utilities Commission (hereinafter "P.U.C." or the "Commission") has a mandated duty to set "just and reasonable rates." Cal. Pub. Util. Code § 451 (*cf.* 16 U.S.C.A. §§ 2601 and 2611(3) re: federal requirements concerning electric utilities). It also has the duty to assure "adequate, efficient, just and reasonable service" to the public. Cal. Pub. Util. Code § 451.

Effectuating these policies requires public awareness of and public participation in Commission activities. For example, state law requires that utilities notify customers of requested rate increases and provide them with an opportunity to contest the proposed increases. Cal. Pub. Util. Code § 454. Federal law pertaining to electric utilities contains similar provisions. 16 U.S.C.A. §§ 2621 and 2625(f).

The P.U.C., after public notice and hearing, gave a consumer advocacy organization, Toward Utility Rate Normalization (hereinafter "TURN"), the right to include inserts in the "empty space" of the billing envelopes of Pacific Gas and Electric Company (hereinafter "PG&E") four times per year. The P.U.C.'s order provides a mechanism whereby knowledgeable ratepayer associations have the opportunity to solicit membership and funds, to disseminate important information, and to participate effectively in the regulatory process. This order was well within the P.U.C.'s constitutional authority to establish rates and rules, and take testimony. (Cal. Const. art. 12, § 6). The "empty space" was determined by prior decision to be the property of the ratepayers and not that of the public utility. (P.U.C. Decision No. 93887.) This order is now final. See P.U.C.'s Motion to Dismiss, p. 8.

PG&E contends that the Commission's order granting TURN access to the billing envelopes is constitutionally infirm as it violates PG&E's rights to freedom of speech and freedom of association under the First and Fourteenth Amendments.

Amici contend that the central issue in this case does not turn on who owns the billing envelope, who pays the postage, or peculiarities of postal rates, but upon more fundamental issues concerning the State's ability to regulate

public utilities. The order is a reasonable exercise of the Commission's regulatory powers. It fosters public knowledge, debate and participation in P.U.C. matters. Moreover, the order encourages our citizenry to petition their government on the cost of vital services and minimizes the potential harm of undue influence by state-created monopolies in subjecting them to more adversarial proceedings before the P.U.C. Ultimately, the goal is to enhance the Commission's ability to set equitable rates and assure reasonable service to the public.

B. Inasmuch as National Policy Strongly Disfavors Monopolies, The P.U.C.'s Order Is a Reasonable Exercise of the State's Police Powers in Regulating State-Created Monopolies

The dangers of monopolies are well known in American history. The Sherman Act —

> "was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." *Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469, 492-93, 84 L.Ed. 1311, 310 S.Ct. 982.

Section 1 of the Sherman Act (15 U.S.C.A § 1) was drafted in the broadest possible terms. "Language more comprehensive is difficult to conceive." *U.S. v. Underwriters Assn.* (1944) 322 U.S. 533, 553, 88 L.Ed. 1440, 64 S.Ct. 1162; *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 787, 44 L.Ed.2d 572, 95 S.Ct. 2004, *reh. den.* 423 U.S. 886, 46 L.Ed.2d 118, 96 S.Ct. 162. This court has observed that —

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates* (1972) 405 U.S. 596, 610, 31 L.Ed.2d 515, 92 S.Ct. 1126; *Community Communications v. Boulder* (1982) 455 U.S. 40, 56, 70 L.Ed. 2d 810, 102 S.Ct. 835.

Public utilities are not exempt from antitrust laws. 16 U.S.C.A. §§ 2602(1) and 2603. Their right to exist and function as monopolies is premised upon State authorization and then, only when actively supervised by the State. *Cantor v. Detroit Edison Co.* (1976) 428 U.S. 579, 596-597, 49 L.Ed.2d 1141, 96 S.Ct. 3110; *California Liquor Dealers v. Midcal Aluminum* (1980) 445 U.S. 97, 63 L.Ed.2d 233, 100 S.Ct. 937.

An implied exemption to the Sherman Act was created by this Court in the area of State economic regulation. There is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its

legislature." *Parker v. Brown* (1943) 317 U.S. 341, 350-51, 87 L.Ed. 315, 63 S.Ct. 307.

State regulation of public utilities falls well within the "implied exemption" rule. This Court has observed that —

> ". . . [P]ublic utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation." *Cantor v. Detroit Edison Co., supra* at 595-596.

In his dissenting opinion in *Consolidated Edison v. Public Serv. Comm'n* (1980) 447 U.S. 530, 65 L.Ed.2d 319, 100 S.Ct. 2326, Justice Blackmun noted the unique nature of a public utility as a state-created monopoly and commented as follows:

> "This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching. For this reason, the State regulates the rates that utilities may charge." *Id.* at 550.

In *Cantor v. Detroit Edison Co., supra,* this Court made a similar observation:

> "Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition . . . [A]ll economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation." *Id.* at

595-596; *Sale v. Railroad Commission* (1940) 15 Cal.2d 612, 617, 104 P.2d 38.

The P.U.C.'s order promotes effective regulation of utilities. The Commission reasonably found that a knowledgeable and active public represented by experienced ratepayer organizations will provide ideas, suggestions, information and proposals that will lead to better informed decision-making by the Commission. Clearly, the order enhances public scrutiny of public utility proposals.

Rate setting is a complex and difficult process and is beyond the ability of most citizens to present meaningful comment. While state law provides for the payment of attorneys' fees, expert fees and other costs to consumers under certain circumstances (20 Cal.Admin. Code §§ 76.01 *et seq., cf.* 16 U.S.C.A. § 1632), compensation for these expenses are not guaranteed. Nor does the possibility of such compensation necessarily encourage grassroots participation in P.U.C. matters. Requiring public utilities to "envelope share" with ratepayer organizations is the most effective means of affording the general customer population a meaningful mechanism to become involved in P.U.C. matters.

The value of the contributions made by ratepayer organizations in P.U.C. proceedings is substantial. The P.U.C. expressly found that "[p]articipation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff" and that "TURN's proposal will help assure the fullest possible participation in our proceedings." (*See* P.U.C.'s Motion to Dismiss, A-36, Findings 29 and 30.)

Both utility shareholders and utility customers have strong economic reasons for having their views prevail. Shareholders want high rates in order to achieve higher

dividends. Conversely, customers want to minimize the amount of their utility bills. The P.U.C. is interested in making wise, informed decisions so that rates will be "just and reasonable" to customers and so that shareholders may enjoy a reasonable rate of return on their investment. In order to foster these goals, the P.U.C. exercised its broad police powers over public utilities and established a mechanism to give PG&E's 3.6 million electric customers and 2.9 million gas customers an effective voice before the Commission.

In the area of public utility regulation, the competition in the "marketplace of ideas" comes from the public utility's customers rather than from competing businesses. The P.U.C.'s order encourages such competition which is the cornerstone of our economic system. Through weighing competitive ideas, information and proposals, the Commission can more ably discharge its duties in regulating public utilities.

C. The State Has an Important Interest in Promoting Public Awareness and Public Participation in P.U.C. Matters

Both *Consolidated Edison v. Public Serv. Comm'n, supra,* and *Central Hudson Gas v. Public Service Comm'n* (1980) 447 U.S. 557, 65 L.Ed.2d 341, 100 S.Ct. 2343, concerned the public utility's right of free speech. Now this Court must decide if the State can foster the speech of its citizens by requiring public utilities to enclose literature from ratepayer associations in billing envelopes. In the case of PG&E, customers in 48 of the State's 58 counties, 3.6 million electric customers, 2.9 million gas customers, and 3.7 million households are involved. (*See* Appellant's Brief, pp. 3-4.)

The State's ability to provide a forum for speech to millions of its citizens is critical to its police powers over public utilities. Recently, this issue was decided favorably to the State by the West Virginia Supreme Court. *West Virginia-Citizen Action Group et al. v. Public Service Comm'n* (Case No. 16512, decided May 30, 1985) — W. Va. —, — S.E.2d —. In that case, the Appalachian Power Company, a public utility, enclosed a pamphlet in each billing envelope which described acid rain as a "perceived but unproved problem" and urged each customer to contact certain elected officials to defeat pending federal legislation. Several non-profit organizations which had an interest in the acid rain problem requested permission first from the public utility and subsequently from the Public Service Commission to enclose literature presenting the opposing side of the issues in the billing envelopes. The public utility denied the request outright, while the commission denied the request on jurisdictional grounds.

In reversing the order of the Public Service Commission, the West Virginia Supreme Court stressed the importance of "fairness" and providing a "public forum" so that complete information involving controversial issues may reach the consuming public. The Supreme Court stated the following:

> "Accordingly, we hold that where a public utility communicates, through its billing process, with its customers upon matters concerning the costs customers must bear if certain legislation concerning utilities is enacted into law, the Public Service Commission of West Virginia has jurisdiction under its authority to (1) safeguard the interests of the public, and (2) regulate the 'practices, services and rates of public utilities,' to establish methods by which the utility's customers may receive contrasting or opposing viewpoints concerning such costs." (Slip Opinion, p. 21.)

Similarly, the P.U.C.'s order is well within its regulatory powers over public utilities. The Legislature has plenary powers over public utilities. Cal. Const. art. 12, § 5. Many of these powers have been delegated to the Commission including the power to establish its own procedures (Cal. Const. art. 12, § 2), the power to "fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts" for all public utilities under its jurisdiction (Cal. Const. art. 12, § 6), and the power to "do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction" (Cal. Pub. Util. Code § 701). The P.U.C.'s order is a reasonable exercise of its authority to fix rates, establish rules and take testimony. It fosters the Commission's information-gathering ability by stimulating public awareness and participation in Commission matters, thereby creating a "check and balance" approach to Commission proceedings through broader-ranging speech.

State law requires that the retail rates charged by public utilities to their customers be "just and reasonable" and that the public has a right to participate in the rate setting process. (*E.g.* Cal. Pub. Util. Code §§ 451 and 454; *cf.*16 U.S.C.A. §§ 2601, 2611, 2621, 2631, 2632.) In furtherance of these legislative goals, the Commission's order provides a forum from which the ratepayers' voice can be heard thereby encouraging a full, public discussion of issues pertaining to rates and services while promoting more

active, informed public participation in the Commission's proceedings. Consequently, the order is a reasonable exercise of the State's supervisory powers over its public utilities because it establishes a procedure to assure that the Commission discharges its duty in setting equitable rates and assuring reasonable services in a wise and prudent manner. As discussed in Argument II, *infra*, the order does not infringe on the utility's freedom of speech or freedom of association.

Even though the ratepayers do not have a constitutional right to include their notices in public utility billing envelopes nor to receive information via such envelopes (*cf. U.S. Postal Service v. Greenburgh Civic Assns.* (1981) 453 U.S. 114, 69 L.Ed.2d 517, 101 S.Ct. 2676; *Seattle Times Co. v. Rhinehart* (1984) — U.S. —, — L.Ed.2d —, 104 S.Ct. 2199; *Perry Educ. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 74 L.Ed.2d 794, 103 S.Ct. 948), *U.S. v. Albertini* (decided June 24, 1985) — U.S. —, 53 U.S.L.W. 4844), the State does have an interest and a right to require such notices when it determines that this is a reasonable means to promote speech and greater participation by the public in the rate-setting process. The value of both political and commercial speech is unquestioned. This court has recognized —

> "[T]hat people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 770, 48 L.Ed.2d 346, 96 S.Ct. 1817.

The goal of the First Amendment is to achieve "the widest possible dissemination of information from diverse

and antagonistic sources . . . " (*F.C.C. v. Nat. Cit. Comm. For Broadcasting* (1978) 436 U.S. 775, 795; 56 L.Ed.2d 697, 98 S.Ct. 2096, quoting from *Associated Press v. United States* (1945) 326 U.S. 1, 20, 89 L.Ed. 2013, 65 S.Ct. 1416) and "to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co. v. F.C.C.* (1969) 395 U.S. 367, 390, 23 L.Ed.2d 371, 89 S.Ct. 1794, also quoting from *Associated Press v. United States, supra* at 20.

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana* (1964) 379 U.S. 64, 74-75, 13 L.Ed.2d 125, 85 S.Ct. 209; *Red Lion Broadcasting Co. v. F.C.C., supra* at 390; *CBS, Inc. v. F.C.C.* (1981) 453 U.S. 367, 396, 69 L.Ed.2d 706, 101 S.Ct. 2813. The State has a compelling interest in assuring public access to information and meaningful public participation in the P.U.C.'s regulatory process over monopolistic public utilities. Clearly, the services public utilities provide such as gas, electricity and water serve basic human needs. Each public utility customer has an interest in and is affected by utility rates. To the economically disadvantaged, the cost of such services is vital. The P.U.C. acted reasonably and responsibly in giving utility customers a voice that can be heard through billing envelope access.

Unless this court upholds the P.U.C.'s order, public utilities may be able to limit effective participation by customers at Commission hearings, thereby restricting the free flow of essential information from ratepayers to the P.U.C. No public benefit can come from such a situation. The States must be free to enact effective regulations

assuring a public voice in the establishment of the cost of those services vital to everyone.

II.

THE P.U.C.'S ORDER DOES NOT VIOLATE PG&E'S RIGHTS OF FREE SPEECH AND FREE ASSOCIATION BUT RATHER PROMOTES TRADITIONAL FREE SPEECH VALUES

A. Introduction

At issue in this case is not whether PG&E's speech is restricted, but whether other voices can be heard. The Commission's order does not regulate the content of PG&E's speech nor does it prevent PG&E from inserting its publication, *Progress*, in each billing envelope at its own expense. As the Commission stated —

> "Nothing in the decision prohibits PG&E from disseminating *Progress* in the billing envelope, even in the months in which access is granted to TURN, so long as it pays the additional postage costs, if any; and if the envelope space is lacking, PG&E is free to expand the size of its envelope." P.U.C.'s Motion to Dismiss, p. 15.

Simply put, the order gives billing envelope access to TURN, a ratepayer association with a track record of proven value to the P.U.C. [1]

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[1] The P.U.C. expressly found that "TURN has demonstrated in its testimony and in past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population." P.U.C.'s Motion to Dismiss, p. A-19.

This Court has recently held that public utilities have the right of free speech under the First and Fourteenth Amendments and may exercise that right through the utilities' billing envelopes. *Central Hudson Gas v. Public Service Comm'n, supra; Consolidated Edison v. Public Serv. Comm'n, supra.* These rulings were based on the high value this country places on public debate and public awareness. "Freedom of speech is 'indispensable to the discovery and spread of political truth,' [citation] and 'the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .' " *Consolidated Edison v. Public Serv. Comm'n, supra* at 534. In *Central Hudson Gas v. Public Service Comm'n, supra* at 562, this Court stressed that people " 'will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .' " Our historic commitment to the freedom of speech is based on the premise that the " 'use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . .' " *Consolidated Edison v. Public Serv. Comm'n, supra* at 534.

In this case, a public utility seeks to suppress speech while the State has fashioned a means to encourage it. The same factors which compelled this court to extend the freedom of speech to public utilities should now prompt it to uphold the P.U.C.'s order extending effective speech to the utility's customers.

B. The State Has a Substantial Interest in Extending Effective Speech to Public Utility Ratepayers

P.U.C.'s rationale for providing public access to billing envelopes through representative ratepayer associations includes the following: (1) the empty space in the envelope belongs to the ratepayers; (2) the utilities have been permitted to use the extra space, without charge, to communicate with ratepayers; (3) the extra space should be used for the benefit of ratepayers; (4) TURN represents the interest of a substantial number of ratepayers and will be unable to do so in future proceedings because of fiscal constraints; (5) allowing TURN to occasionally use the extra space assures more complete ratepayer understanding and participation in energy issues involving their utility; and (6) the P.U.C. benefits by the effective participation of consumer organizations in its proceedings. *See generally* P.U.C.'s Motion to Dismiss, pp. A-19 to A-24, A-33 to A-36.

The Commission summarized its reasons as follows:

> "Our goal . . . is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from that of PG&E." P.U.C.'s Motion to Dismiss, p. A-22.

PG&E argues that by giving consumers envelope access, the Commission has limited PG&E's speech. For the reasons set forth below, PG&E's speech has not been limited. If, arguendo, there is some limitation, nonetheless, the right to exercise free speech must be balanced against societal interests. *E.g. Hynes v. Mayor of Oradell* (1976)

425 U.S. 610, 48 L.Ed.2d 243, 96 S.Ct. 1755 (noncommercial speech); *Friedman v. Rogers* (1979) 440 U.S. 1, 59 L.Ed.2d 100, 99 S.Ct. 887, *reh. den.* 441 U.S. 917, 60 L.Ed.2d 389, 99 S.Ct. 2018 (commercial speech). The P.U.C.'s order regulating speech must meet *one* of three standards: "(i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, *or* (iii) a narrowly tailored means of serving a compelling state interest." (Emphasis added). *Consolidated Edison v. Public Serv. Comm'n, supra* at 535.

Amici believe that when this court balances the State's interest in promoting speech against appellant's interest in suppressing speech under each of the three enumerated standards, the scales will careen down on the side of the State in each instance.

C. The P.U.C.'s Order Does Not Regulate the Time, Place and Manner of PG&E's Speech

"A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable" and is content-neutral. *Consolidated Edison v. Public Serv. Comm'n, supra* at 536. PG&E seemingly contends that the Commission's order does not meet this standard because the "time, place, or manner" test applies only when the speaker (who is supposedly interfering with PG&E's speech) has a pre-existing right in the speaker's platform whereas the Commission's order requires forced entry into PG&E's billing envelopes. Appellant draws the analogy to governmental limitations on the use of public sidewalks. App. Brief, pp. 20-22. Appellant's argument must fail for three reasons.

First of all, the Commission's order does not attempt to regulate the time, place or manner of PG&E's speech. As previously discussed, PG&E is free to enclose *Progress* in each month's billing envelope, even in the months when TURN's literature is enclosed.

Secondly, the P.U.C. clearly held that the "empty space" was the property of the ratepayers, and not Appellant's. This order is now final. See P.U.C.'s Motion to Dismiss, pp. 8 and A-33.[2]

Thirdly, even if the Commission had found that the empty space belonged to PG&E, proprietary rights in private property are subject to State regulation. *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 64 L.Ed.2d 741, 100 S.Ct. 2035 is a case in point. At issue in *Pruneyard* was whether members of the public had a right under state law to circulate petitions and distribute pamphlets of a political nature in a privately owned shopping center against the owner's wishes. Holding that they did, this Court observed that "neither property rights nor contract rights are absolute. . . . Equally fundamental with the private right is that of the public to regulate it in the common interest . . . ." *Id.* at 84-85, quoting from *Nebbia v. New York*, (1934) 291 U.S. 502, 523, 78 L.Ed. 940, 54 S.Ct.

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[2] The P.U.C.'s order was not based solely upon that premise. In its order, the P.U.C. emphasized that "our jurisdiction over the extra space does not depend solely or entirely on a determination of the ownership of the extra space or the exact nature of a property right in such space." P.U.C.'s Motion to Dismiss, p. A-6.

Amici do not believe that ownership of the empty space controls the propriety of the Commission's order. Rather, we maintain that the P.U.C.'s order is a valid exercise of the State's police powers over public utilities even absent the ratepayers' proprietary interest in the empty space.

505. This is even more evident when the State is regulating a utility which provides vital services a consumer cannot otherwise obtain.

D. The P.U.C.'s Order Is a Permissible Subject-Matter Regulation

The P.U.C.'s order does not regulate the content of speech. Rather, it controls the vehicle by which speech can be delivered to the public. As discussed in Argument I, *infra*, the State has plenary powers over public utilities, broad powers of which were delegated to the P.U.C. This power has been summarized by the P.U.C. (which has always exercised control over billing envelopes) as follows:

> "The extra space in the billing envelope is a by-product of an activity essential to the operation of the regulated utility — billing. Since billing is an essential and proper function of a regulated utility, this Commission has allowed the utility to recover its reasonable expenses — postage, materials, labor, overhead — from ratepayers. The existence of the extra space is a direct consequence of the act of billing for utility services and the way in which postal costs are assessed.
>
> "Because the billing space is so inextricably related to activities subject to routine regulation, we have repeatedly exercised our authority under the State Constitution and Public Utilities Code section 701 to permit and require the space to be used for the benefit of ratepayers." P.U.C.'s Motion to Dismiss, pp. A-6 to A-7.

Billing envelopes have routinely been used to inform customers of proposed rate hikes and public hearings

without challenge. Public utilities have also been required to enclose important information concerning conservation programs, federal tax law and other public service-oriented information. P.U.C.'s Motion to Dismiss, p. A-7. PG&E does not even challenge that portion of the P.U.C.'s order which gives the Commission first priority "to the billing and legally-mandated notices to customers." P.U.C.'s Motion to Dismiss, p. A-22. Rather, its challenge is limited to the propriety of TURN's use of the empty space.

The government's control over speech has always been recognized where a regulation was a reasonable exercise of its police powers. *E.g., Red Lion Broadcasting Co. v. F.C.C., supra* (broadcasters may be required to air opposing views); *U.S. Postal Service v. Greenburgh Civic Assns.* (1981) 453 U.S. 114, 69 L.Ed.2d 517, 101 S.Ct. 2676 (public access to mail boxes may be properly outlawed); *Perry Education Assn. v. Perry Local Educators' Assn., supra* (public access to school mail boxes may be restricted); *Seattle Times Co. v. Rhinehart, supra* (public access to discovery documents may be restricted); *Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 56 L.Ed.2d 444, 98 S.Ct. 1912, *reh. den.* 439 U.S. 883, 58 L.Ed.2d 198, 99 S.Ct. 226 (attorneys' means of soliciting clients may be restricted); *Friedman v. Rogers, supra* (use of trade names by optometrists may be prohibited); *Young v. American Mini Theatres* (1976) 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440, *reh. den.* 429 U.S. 873, 50 L.Ed.2d 155, 97 S.Ct. 2440, (location of adult theaters may be regulated); *F.C.C. v. Nat. Cit. Comm. For Broadcasting* (1978) 436 U.S. 775, 56 L.Ed.2d 697, 98 S.Ct. 2096 (co-ownership of newspapers and broadcast stations may be regulated); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, (decided July 2, 1985) — U.S. —, 53 U.S.L.W. 5116 (government can properly exclude legal

defense and political advocacy organizations from participation in the Combined Federal Campaign.)

By requiring public access to billing envelopes, the P.U.C. acted reasonably in exercising its regulatory powers over appellant. The Commission uses the billing envelope for its own legal notices "precisely because the billing envelope is such an effective method of communicating with ratepayers." P.U.C.'s Motion to Dismiss, p. A-7. For probably the same reason, PG&E uses the billing envelope to disseminate *Progress.* Creating a doctrine of fairness which provides a shared soapbox as the catapult of free speech pursuant to the State's regulatory powers over public utilities is not unreasonable. *Cf. Red Lion Broadcasting Co. v. F.C.C., supra.*

E. The P.U.C.'s Order Is Narrowly Drawn to Serve a Compelling State Interest

Appellant gives a plethora of reasons why its speech alone should be protected. PG&E claims that the P.U.C.'s order impairs its right to communicate with its customers, mandates the carrying of others' messages, and is not content-neutral. Amici contends the Commission's order democratically enhances its regulatory proceedings by providing free speech to utility customers without impairing the speech of others.

Nothing in the order prohibits PG&E's right to speak to its customers directly through each billing envelope or by any other lawful means. The only restriction is the firmness of appellant's hold on its own purse strings. PG&E may include its literature in each month's billing envelopes as long as it pays the additional postage. Since the empty space is ratepayers' property, Appellant's literature will continue

to be mailed at ratepayers' expense during the other months. The order neither precludes nor compels speech by PG&E or by others. It only provides a forum for speech. *See Red Lion Broadcasting Co. v. F.C.C., supra* at 375.

Appellant expresses concern that "the commission takes on the awesome and completely unmanageable task of picking and choosing from the multitude of competing interests, including political groups, who may wish to communicate through PG&E's envelope." App. Br. p. 25, n. 19. This concern is speculative at best and ignores the facts of this case. The record reveals that out of millions of customers served by Appellant, TURN was the *only* applicant who requested use of the empty space. P.U.C.'s Motion to Dismiss, p. A-35.

Clearly, this lack of other requests emphasizes the importance of opening the billing envelope to the speech of others. The Commission expressly reserved the right to review additional meritorious proposals should any arise in the future. P.U.C.'s Motion to Dismiss, p. A-37. If the P.U.C. abuses its authority concerning future proposals, such orders will obviously be subject to appropriate judicial review.

F. The P.U.C.'s Order Does Not Violate PG&E's Freedom of Association and Right to Remain Silent

Appellant and its amici supporters contend that the Commission's order violates PG&E's right of free association and right to remain silent, relying on *Wooley v. Maynard* (1977) 430 U.S. 705, 51 L.Ed.2d 752, 97 S.Ct. 1428 and *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 41 L.Ed.2d 730, 94 S.Ct. 2831 for the

proposition that state-mandated speech is constitutionally infirm. Their reliance on these cases is misplaced.

In *Wooley*, this court upheld an injunction prohibiting New Hampshire from arresting and prosecuting motorists who cover up the State's motto "Live Free or Die" on vehicle license plates. This Court found that there was insufficient State interest to compel such ideological speech. *Wooley* did not prohibit the State from displaying its motto on license plates, but merely gave motorists the right to disassociate themselves from it if they wished to do so.

Unlike *Wooley*, the Commission's order clearly states that "all of TURN's bill insert material should clearly identify TURN as its source and state that its contents have neither been reviewed nor endorsed by PG&E or this Commission." P.U.C.'s Motion to Dismiss, p. A-23. Such disclosures have been recognized as an effective means of preventing public confusion. *See Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 384, 53 L.Ed.2d 810, 97 S.Ct. 2691, *reh. den.* 434 U.S. 881, 54 L.Ed. 164, 98 S.Ct. 242; *Central Hudson Gas v. Public Service Comm'n, supra* at 565, 570-71; *Pruneyard Shopping Center v. Robins, supra* at 88; *Zauderer v. Office of Disciplinary Counsel* (decided May 28, 1985) __ U.S. __, 53 U.S.L.W. 4587, 4594.

Appellant's concern that the public will confuse TURN's literature for that of its own is purely speculative. The public is not likely to confuse TURN's literature as being that of PG&E any more than it is likely to regard the Commission's notices as coming from appellant. Certainly, the P.U.C. is not impotent to address the problem of public confusion *should* it ever arise. As the Commission noted, it "expect[s] PG&E and TURN to work together in good faith to overcome problems. If insurmountable problems arise, we may have to issue further clarifying orders." P.U.C.'s

Motion to Dismiss, pp. A-23 to A-24. Surely, the State has the ability to assure that "information flow[s] cleanly as well as freely." *Va. Pharmacy Bd. v. Va. Consumer Council, supra.* The mandated disclosures will assure a clean and free flow of information.

In *Tornillo,* this Court ruled that a Florida statute which required newspapers to publish replies of political candidates they criticized to be an unconstitutional infringement on the newspapers' right to determine what to print and omit. This court observed that if a right-of-access statute was upheld, "editors might well conclude that the safe course is to avoid controversy" (*Id.* at 257) thereby stifling rather than promoting free speech.

The instant case is substantially different from that of *Tornillo.* As Justice White stated in his concurring opinion, "[a] newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed." *Id.* at 259. While the number of newspapers may be in attrition, no monopoly exists on news. Other newspapers, publications, radio and television broadcasts expose Americans to a rainbow of viewpoints. Civil remedies are available for candidates who feel they have been libeled, the pursuit of which may in turn constitute news. Unlike public utilities, newspapers are not creatures of government and do not depend on governmental permission for their right to exist. *Cf. Red Lion Broadcasting Co. v. F.C.C., supra.* Nor are newspapers exempt from antitrust laws. *Associated Press v. United States, supra; F.C.C. v. Nat. Cit. Comm. For Broadcasting, supra.* The Commission's order does not compel PG&E to speak against its wishes.

Amici Wisconsin State Telephone Association and Wisconsin Bell, Inc. complain in their joint brief that while "utilities were formerly free to speak to their customers through the billing envelope without concern that their statements would be immediately attacked through the same medium . . . ", the "utilities must respond or suffer the clear implication that the accusations are true. (Footnote omitted)" The Appendix to their joint brief shows examples of the ratepayers' speech. This is exactly the type of public debate the Commission is trying to promote. The Commission will be in a far superior position to properly regulate when responding to a variety of views rather than just one.

CONCLUSION

Public utilities operating as monopolies exist by the grace of the State. Without State sanction, public utilities would not be permitted to exist in monopolistic form. Because of the potential harm to the public which is inherent in any monopoly, the State has the responsibility to carefully regulate that which it created in order to safeguard the legitimate interests of its citizens.

Our American heritage has taught us the value of free speech, the safety valve exposing us as citizens and regulators to competing ideas with the trust that truth will prevail and wise decisions will consequently ensue. With these principles in mind, the P.U.C., having previously found that such input was beneficial to the Commission in exercising its regulatory functions, issued its challenged order, the purpose of which was to provide greater public participation in its proceedings.

It is self-evident to Amici that the State has a compelling and overriding interest in being able to solicit the comments of its citizens in discharging its official duties. Of appellant's millions of customers, only *one* voice asked to be heard. Without that voice, there is silence.

The billing envelope is the sidewalk of public debate in public utility regulation, and the platform from which both the Commission and PG&E speak to the public. Opening the billing envelope to competing messages fosters, not frustrates, free speech. We ask this court to affirm the P.U.C.'s order.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, July 18, 1985, I served the within BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEES in re: "Pacific Gas and Electric Company vs. Public Utilities Commission of the State of California" in the United States Supreme Court, October Term, 1984, No. 84-1044;

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

FREDERIC D. WOOCHER, JOHN R. PHILLIPS, CENTER FOR LAW IN THE PUBLIC INTEREST, 3rd Floor, 10951 West Pico Boulevard, Los Angeles, CA 90064;

JEROME B. FALK, JR., STEVEN L. MAYER, HOWARD, RICE, NEMEROVSKI, CANADY, ROBERTSON & FALK, 7th Floor, Three Embarcadero Center, San Francisco, CA 94111; .

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MALCOLM H. FURBUSH, PACIFIC GAS AND ELECTRIC COMPANY, P. O. Box 7442, 77 Beale Street, San Francisco, CA 94120;

All parties required to be served have been served

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on July 18, 1985
at Los Angeles, California.

Kathleen Kaltenbach

Office-Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,

No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA, et al.,
Appellees.

ON APPEAL
FROM THE SUPREME COURT OF CALIFORNIA
BRIEF OF CENTER FOR PUBLIC INTEREST LAW
OF THE UNIVERSITY OF SAN DIEGO SCHOOL OF LAW
IN AMICUS CURIAE IN SUPPORT OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

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I.

INTRODUCTION

On April 6, 1983, the PUC decided *Center for Public Interest Law, et al. v. San Diego Gas and Electric Company* (No. 83-04-020, 1983). This decision first established an apparently close precedent now being challenged in the instant case before this Honorable Court. The *Center* case involved a comprehensive proposal to establish a ratepayer representative organization.

The Center respectfully applies to have its arguments considered by this Honorable Court as to the impact of the issues raised by the instant litigants on other preexisting organizations. Such argument is, in the most traditional sense, an *amicus curiae* contribution.

II.

IDENTIFICATION OF *AMICUS CURIAE* APPLICANT

The Center for Public Interest Law at the University of San Diego School of Law is a non-profit academic center of learning focusing on the regulatory process within the State of California. The Center publishes the *California Regulatory Law Reporter*, the major academic journal monitoring and reviewing regulatory agency activity in the State.

The Center for Public Interest Law was also the complainant in *Center for Public Interest Law, et al. v. SDG&E*, No. 83-04-020, 1983), as noted above, the lead holding of the PUC allowing access to the billing envelopes of a regulated utility to another entity prior to the instant case. In addition to being a party, the Center litigated the case as counsel in administrative hearings before Administrative Law Judge Alison Colgan and was subsequently ordered by the Public Utilities Commission to create a ratepayer group called Utility Consumers Action Network (UCAN) pursuant to the Center's proposal. An Interim Board was appointed

to establish the entity to be given access and to supervise fair elections.

III.

THE INTERESTS OF THE *AMICUS CURIAE* APPLICANT IN THE INSTANT PROCEEDINGS, PERMISSION OF LITIGANTS.

The Center for Public Interest Law was the original proponent of UCAN and of its right to access to the billing envelopes of SDG&E for purposes of communication and membership solicitation. As its proponent, the Center has an interest in seeing to it that it is not terminated, particularly after proving itself a success in improving the state regulatory system and in enhancing First Amendment values.

All parties to the instant proceeding have given permission for the filing of this *Amicus* brief.

IV.

RATEPAYERS ARE A LEGITIMATE PART OF THE REGULATORY PROCESS, AND MAY BE AFFORDED A ROLE IN USING THE RESOURCES INVOLUNTARILY PROVIDED BY THEM.

This Court has long recognized a three-part relationship relevant to utility regulation. The regulator, the utility, and the ratepayer constitute the major interested parties in utility regulation. See *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). Lacking marketplace choice, the interests of the ratepayer must be represented through regulatory check over what would otherwise be unfettered monopoly power. It is the well recognized function of the regulator to provide this check, while at the same time

affording a "reasonable rate of return" to utility stockholders. *See Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

The regulator's role in balancing "fair rate of return" for utility stockholders against preventing excessive profits is not the same interest held by either the utility or ratepayer. This decisionmaking by the regulator does not occur in a vacuum. The regulator requires information in order to perform this fundamental regulatory balance.

The record in the *Center* case established serious problems in the regulation of a utility (San Diego Gas and Electric) to the detriment of one of the three parties of interest: the ratepayers. Undisputed evidence established low voltage problems in areas of the County, non-responsiveness by SDG&E to consumer complaints across a panoply of issues, the second highest electrical power rates in the nation, failure to comply with PUC payment plan requirements, overzealous collection attempts and an imbalance of information flow and advocacy to the PUC in rate hearings. The proceedings established that the billings of SDG&E are an expense item paid for off the top by ratepayers, and that SDG&E included information and cause advocacy unrelated to regulation in prior ratepayer financed mailings. The proceedings also established that "dead space" in the billing envelopes existed sufficient to carry inserts from an organization representing ratepayers *at no additional cost to the utility*. This was space the utility (*i.e.* ratepayer) was paying for but which was unused. Expert mail order witnesses testified to the likely effects of the insert to facilitate a voluntary organization. (See RT 1-400, *Center v. SDG&E*, No. 82-03-05).

The purpose of the UCAN proposal was to create an organization fairly representative of the third party in the regulatory proceedings described above; the ratepayers. And to specify PUC rules assuring that representative status. (See complaint, *Center v. SDG&E*, No. 82-03-05.)

As a legitimate party in a three part relationship, ratepayers are compelled to finance utility expenses and to provide a reasonable rate of return on a prudently invested rate base. The UCAN remedy established important safeguards recognizing that the billing envelope, although the property of the utility, involved an equity interest in the party involuntarily financing it. To guarantee that the access grant was to ratepayers, the proposal called for safeguards and standards; a fair and supervised election (with opportunity for nomination by petition) representative of the ratepayer population affected, conflict of interest prohibitions and open meetings guarantees. (See proposed By-Laws, Complaint in *Center v. SDG&E*, No. 82-03-05.)

The Center for Public Interest Law viewed the order of the PUC as a special fiduciary responsibility. An Interim Board was selected including the Mayor of the City, a Republican State Senator, a Democratic Supervisor, prosecutors from the three jurisdictions within the County, a labor leader, a legal aid attorney, the foreman of the grand jury and the Dean of another law school in the County. The election of the Board itself was a demonstration of our democratic system; the Registrar of Voters administered an election of nine permanent Board members from among twenty-seven candidates, eighteen of them petition nominees. The voting percentage from 60,000 UCAN members, who had by then joined, more than doubled the voting percentage of registered voters during the previous municipal elections.

Since the election of the permanent Board, UCAN has hired legal and technical experts to represent SDG&E ratepayers in PUC proceedings.

In August 1984, UCAN intervened in SDG&E's Energy Cost Adjustment Clause (ECAC) proceeding, presenting evidence that SDG&E's requested $56 million rate increase should be reduced by $40 million. The Commission's order reduced SDG&E's request by $36 million.

UCAN is currently intervening in SDG&E's general rate case. UCAN is questioning SDG&E's request for an increased return on investment and whether it is using its new transmission line to purchase sufficient inexpensive power from Southwest utilities. UCAN will also present expert testimony on rate design issues.

UCAN's third SDG&E rate case will be the review of the cost overruns on the San Onofre Nuclear Generating Stations (SONGS) Units Two and Three during hearings set for this summer. UCAN has retained technical experts to seek to disallow from rates those construction costs found to be the result of bad management.

The PUC is preparing to hold hearings on the adoption of a long-range natural gas rate design policy. UCAN has participated in preliminary, informal discussions with Commission staff and is participating in the formal proceeding.

UCAN participated in the Commission's informational hearings on electric utility policy on March 25-26.

UCAN is participating in the PUC's proceeding to decide the procedure to be used to determine the attrition allowance for the third year of a general rate case, now that general rate cases have been extended to three years.

UCAN has participated in California Energy Commission hearings on SDG&E's long-term energy supply plans and hearings on the Commission's proposed regulation to strengthen its energy efficiency standards for refrigerators sold in California. UCAN has also commented on the Energy Commission's draft State Energy Plan.

UCAN devotes substantial resources to a public education program, a major element of which is a quarterly newsletter. UCAN has hosted public speaking appearances by nationally prominent utility experts. UCAN representatives appear on local talk shows

and speak to community organizations. UCAN has responded to hundreds of questions and complaints, providing information and referrals.

UCAN represents effectively the views of otherwise unorganized and silent generalized and diffuse interests. There was no such activity prior to UCAN. *Only* the access provided by the PUC has allowed UCAN to exist and to continue.

V.

PROPER RATEPAYER ACCESS TO BILLING ENVELOPES CAN ENHANCE FIRST AMENDMENT VALUES.

UCAN has voluntarily agreed to an arbitration proceeding with SDG&E where there are disputes concerning the content of inserts. The permanent Board is now in office and is functioning with the confidence of UCAN members and other ratepayers represented by that organization. Its meetings are public and often.

The inserts provided by UCAN add to the diversity of free expression received by ratepayers. This diversity enhances First Amendment values. It is, in essence, a communication from the proper representatives of ratepayers to their fellow ratepayers who finance the billing system. The Pacific Gas and Electric arguments concerning First Amendment infringement and "taking" of property are particularly flawed where the party being given access constitutes the institutionally established will of a legitimate party in the three part relationship, *i.e.* the ratepayers.

The PUC can require an insert *itself* for a regulatory purpose. And we believe that the PUC can delegate that access to a party legitimately representing ratepayers — a legitimacy deriving from institutionally established rules from the PUC to guarantee that representation, or from direct PUC review of the performance of that party on behalf of ratepayers. Whichever mechanism is

chosen: institutional safeguards for ratepayer electoral representation, or PUC review of ratepayer interest assistance, is a matter for policy argument, not Constitutional inquiry. The Center has strenuously argued in favor of the former model, and has successfully implemented it. However, the latter alternative does not impede the First Amendment rights of a utility. They are free to express the views of their stockholders and to compel ratepayer payment for the message. To allow a minimal word from those legitimately speaking for ratepayer interests through this medium enhances discussion and airs alternative points of view, consistent with First Amendment values. And contrary to PG&E argument herein, such messages can be and are properly and ostentatiously marked as to their source. There is no compulsion for a utility to speak an involuntary message. The utility does not pay for the printing or stuffing — or, for that matter, the postage. And in seven UCAN inserts, there has been no measurable confusion about which message is from whom. The PG&E argument about a right "not to speak" is silly. They are not being forced to speak and no one thinks they have spoken.

Without drawing mechanical analogies between shopping center property use cases, symbolic free speech holdings, commercial free speech evolution, etc., what the Court should be focusing on is: 1. Who pays for the messge? 2. Who is, in a practical sense, most deprived of expression opportunity without access? 3. Does access for legitimate ratepayer expression as to one sheet of paper out of five or six in an envelope once every three months (*e.g.* in the case of UCAN), enhance or threaten First Amendment values? Utility sponsored inserts already proliferate to plug favored insulation contractors, promote nuclear energy, solicit for certain charities, publish pictures of missing children, present utility "explanations" for rate hikes, et al.

Certainly the fundamental concern of this Court has been both the right to speak, and practical access to means so one can be heard. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Can one properly argue that the First Amendment requires that

only one voice effectively be heard? The Center does not believe a monopoly utility is exactly like a shopping center, nor is it, when seeking exclusive use of ratepayer financed billing envelopes, exactly like a pharmacy only seeking to advertise prices. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). The question this *Amicus* asks is, in the case of UCAN, can 75,000 voices express themselves in an occasional message to each other and their fellow ratepayers through a medium ratepayers finance not through competitive choice, but by legal imposition.

Can they do so in a society with very high costs of communication access on behalf of an inherently unorganized group? Can the state stimulate such communication at no cost to any other party? Would a federal prohibition on such state enhancement of diversified expression and voluntary organization constitute a betrayal of constitutional principle?

VI.

STATES SHOULD BE GIVEN THE OPPORTUNITY TO FASHION REGULATORY RULES GOVERNING MONOPOLIES WHICH MAY BALANCE IN SOMEWHAT DIVERSE WAYS THE INTERESTS OF: (A) THE MONOPOLIST IN UNFERRERED USE OF ITS PROPERTY AND (B) THE STATE IN A BALANCED AND FAIR SYSTEM OF ADVOCACY BEFORE ITS REGULATORS

In the case of UCAN, we have a state agency which has, after proper evidentiary hearing, established: a) There is no PUC office within 100 miles of the area affected; b) There is an imbalance in advocacy depriving diffuse but momentous interests of representation; c) A means is available to allow communication between ratepayers where it is currently lacking; d) A means is available to facilitate enhanced communication between ratepayer interests

and the regulator; e) Those means will cost the ratepayer and the utility nothing (taken from unusual dead space with printing and organizational expenses entirely funded by voluntary contribution). Similar findings are applicable to TURN.

On what basis can a utility argue that an exalted principle is appropriately invoked to bar such a mechanism? On the basis of societal rules designed to protect fundamental freedoms? On the basis of an interest in diversity of viewpoint? On the grounds of monopoly property rights?

The Center for Public Interest Law respectfully contends that it is important for government to find ways to represent otherwise unorganized groups. Taxpayers, the environment, the politicaly weak and diffuse interests generally, tend to be institutionally underrepresented in our system. Ratepayers constitute a paradigm example of such underrepresentation. It is important that efforts to allow the organization and representation of otherwise diffuse and underrepresented groups be stimulated by public policies and that states be allowed some latitude in accomplishing that balance. Although not an envelope access case, this Honorable Court has recently reaffirmed the importance of State decisionmaking in our federal system in *Garcia v. Antonio Metropolitan Transit Authority*, 53 U.S.L.W. at 4137-38.

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the commonweal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be (at 4140).

VII.

CONCLUSION

California's system to facilitate ratepayer communication and balanced advocacy is a bit different. But differences by local preference is an American strength, not a cause for federal reprimand. We have a considered and *bona fide* attempt to balance legitimate interests by the California PUC. It is not bullying a bereft and impotent victim or taking from a helpless orphan. It is not a bullying at all. It is not a taking at all. It is a *de minimus* and somewhat creative attempt to allow enhanced communication and representation of those who are traditionally the bullied victims. Its impact on Constitutional values? Increased diversity of expression at minimal cost to any party, enhanced First Amendment voluntary association of ratepayers for their common interests, more legitimate due process in rate hearings as ratepayers achieve more balanced advocacy status.

The Center for Public Interest Law respectfully asks that this Honorable Court not reverse the original, and we believe successful, attempt by the PUC of California to improve regulatory governance, stimulate citizenship and vivify Constitutional values.

Dated: July 19, 1985

Respectfully submitted,

Center for Public Interest Law

By: _____
Robert C. Fellmeth

Supreme Court, U.S.
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CLERK

No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Appellees.

On Appeal from the Supreme Court of California

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE APPELLEES

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE APPELLEES

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 95 national and international labor organizations having a total membership of 13,000,000 working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises a First Amendment question this Court has confronted only rarely, and to which the Court has not yet essayed a comprehensive answer: *viz*, whether and, if so, in what manner, the Constitution limits the authority of the government to foster communication among its citizens, where the governmental program doing so provides for the use in some fashion of property that is "private," at least in the sense that the property is not created through, or maintained from, government money.[1]

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[1] There is a great deal of discussion in the various briefs filed in this case as to whether the "extra space" in the utility billing envelope to which appellee Toward Utility Rate Normalization (TURN) has been granted access is in fact the property of the Pacific Gas & Electric Co. (PG&E), or rather, as the Public Utility Commission of the State of California (PUC) determined in an earlier proceeding, in some sense the ratepayers' property. Decision No. 93887 (1981), modified by Decision No. 82-03-047 (1983). *Compare Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 556 (1980) (Blackmun, J., dissenting) (suggesting that "[s]ince it is ratepayers who pay for the billing packet," a State may validly "define property rights so that the billing envelope is the property of the ratepayers and not of the utility's shareholders.")

It is our view that this discussion is a sterile one and that this case can, and should, be decided in favor of the appellees without either accepting or rejecting the PUC's 1981 decision as a binding determination of the nature of PG&E's "property" interest in the billing envelope or in the space within the envelope.

Whether the space in dispute is PG&E's or, in some sense, the ratepayers', it is certainly not the government's, nor does any party

The suggestions we make later in this brief concerning some of the principles which inform the proper answer to this generic question turn to a large degree on the nature of the use of private property the government

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contend otherwise. Indeed, any such contention would be unavailing, for the government, while closely regulating the billing envelope (*see* pp. 6, 11, *infra*), has not contributed any public funds or effort whatever to producing or sending out PG&E's bills. And the objective characteristics of the property in question—*viz.*, that the bill and the envelope are created through money paid by the ratepayers to PG&E, as to which PG&E is to a great extent assured reimbursement because of state ratemaking policies, and that the envelope is subject to an unusual degree of control by the State because of its integral role in public utility regulation (*see* p. 11, *infra*)—do not change depending upon whether one denominates the property that of PG&E or that of the ratepayers.

Moreover, whether or not the State's designation of property interests is conclusive for Fourteenth Amendment purposes (*see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Ruckelshaus v. Monsanto Co.*, —— U.S. ——, 52 L.W. 4886, 4890 (June 26, 1984)) does not necessarily settle whether that designation should decide the First Amendment issues in this case as well. The First Amendment protects not property as such but the system of free expression; whether title to the "extra space" in the billing envelope technically lies in PG&E or not has no direct relationship to whether PG&E's interest in free expression is compromised by the PUC access rule.

For example, PG&E relies heavily on *Wooley v. Maynard*, 430 U.S. 705 (1977). While we believe that the principles underlying *Wooley* have no application to this case (*see* pp. 19-24, *infra*), we also believe it extremely unlikely that the result in that case would have been different if the automobile in question had been borrowed or rented rather than owned by the plaintiffs. Similarly, we assume that PG&E would be raising the same First Amendment arguments in this Court if the PUC order had required TURN to pay a pro-rata share of the cost of mailing the billing envelope.

We therefore suggest that it is proper for the purposes of analyzing the question presented here to assume that the "property" at issue belongs for Fourteenth Amendment purposes to PG&E, as opposed to the ratepayers collectively or individually, at least until the envelope is mailed. (*See* Cal. Civil Code 3985 (a mailing envelope on receipt becomes the property of the recipient).)

proposes; upon the relationship between the individuals whose access to that property for communication is supported by the government, the complaining property owner, and the intended recipients of the communication; and the way in which the communication is related to an overall regulatory program.

We begin by exploring these factors in the context of this lawsuit. *See* part I *infra*. As we demonstrate, because PG&E is a natural monopoly, California has designated a commission to set reasonable rates as a substitute for having the market set the rates; and the State has charged the PUC with the responsibility of gathering the broad range of information necessary for such a complex economic decision. Over time, the PUC, in agreement with observers of utility regulation generally, has discovered that to fulfill its regulatory role there is a need for vigorous, informed ratepayer representation at its proceedings; otherwise, the agency is in danger of becoming the "captive" of the industry, because the utilities have the widest range of pertinent information and expertise. It is principally to aid in the development and effectiveness of this kind of ratepayer participation in the regulatory system that the PUC determined to grant TURN, an established representative of ratepayer interests, a limited right to insert TURN communications in the utility billing envelope. That envelope is the only regular means of communication to the ratepayer constituency as a whole, is charged to the ratepayers in figuring PG&E's costs, and contains notice of ratemaking proceedings as well as other PUC-prescribed informational inserts. The billing envelope is therefore the most natural means of communication among ratepayers.

In part II, *infra*, we discuss briefly the applicability of state action principles to this case. It is clear under this Court's precedents that the distinctive characteristics of PG&E and of the billing process—for example, the monopoly character of the utility and the consequent very close government supervision of the relationship between the

company and the ratepayers—do *not* combine to create a situation in which the utility is identified with the State for constitutional purposes. There is therefore no independent First Amendment right of ratepayers to communicate through the billing envelope. But the fact that the Constitution does not compel access does not mean that the government is without legislative power to provide access. The instant case present only one of several circumstances in which the government has determined to permit access to private property for a communicative purpose and in upholding governmental action that provides such access, this Court has not viewed state action determinations as in any way a limitation on the government's authority to do so.

Part III, *infra*, treats with the central constitutional claim raised by PG&E in this case—that the utility has a First Amendment right to refuse to allow TURN's access to the billing envelope, because the PUC order providing such access compels PG&E, contrary to its wishes, to support another's communicative activity. Upon examination, the First Amendment interest asserted to support this claim prove ephemeral. The right not to speak that this Court has recognized derives its force from the prong of the First Amendment which protects individual self-expression. As such, this inverse First Amendment right forbids governmental requirements that directly intrude into an individual's autonomy and do so in order to impose uniformity of belief. Where, as here, the complaining party is not an individual but a business corporation, the property to which access is provided is basically commercial property, and the access requirement is designed to advance rather than stifle a diversity of views, there is no interference with the rights protected by the First Amendment.

PG&E suggests, however, that this case involves more than its bare right not to speak since the utility uses the billing envelope for its own speech, in the form of its newsletter, the *Progress*. As we show in part IV, *infra*, however, this is not a case in which a speaker is being

relegated to a different forum; PG&E is permitted to continue transmitting its newsletter in the billing envelope. Nor is this a situation in which the right of access provided by the government depends upon PG&E having chosen to publish its newsletter. The reason for the access requirement—enhancing the PUC's regulatory process through more effective ratepayer participation—has nothing to do with PG&E's publication of the *Progress*, and the right of access does not in any way hinge upon whether PG&E publishes its newsletter or not. While it is true that the PUC order may result in higher costs to PG&E in transmitting the *Progress*, the First Amendment does not provide a *per se* guarantee against government regulations that have the incidental effect of increasing the costs of publishing. Thus, that order simply is not a "penalty" on speech prohibited by the First Amendment.

The final reason put forward by PG&E for invalidating the PUC order is that impermissible content and identity distinctions will inevtitably be involved in administering the right of access. As we discuss in Part V, *infra*, the need to set firm principles for selecting among groups and individuals seeking access to utility billing envelopes has not yet arisen. Thus, this consideration should influence the result in this case if and only if there is *no* possible selection principle that would be valid. But as this Court has had several recent occasions to reiterate, the First Amendment allows the government, in controlling access to property, other than a "traditional public forum," to select among those seeking to speak on the basis of such considerations as the underlying reasons for allowing access in the first place. Beyond the general principle that there are such valid criteria, there is no reason to go in this case. If and when an individual or group is denied access to the billing envelope and complains about the standards applied, there will be time enough to decide whether the particular standards used are valid or invalid.

ARGUMENT

I. The Role of Ratepayers and Ratepayer Representatives in Utility Regulation. PG&E is engaged generally in providing a public utility service; the generation and transmission of gas and electricity. That business is, because of its inherent characteristics, a natural monopoly.[2] For that reason, and because the services provided are often practical necessities in the modern world, public utilities, unlike private businesses in general, are precluded by law from selecting or discriminating among their customers. Instead a "utility is required to supply all reasonable demands for service by those who can pay for it." P. Garfield and W. Lovejoy, *Public Utility Economics* (1964) at 13. The regulation of the resulting supplier-consumer relationship, imposed as a substitute for competition, is pervasive, including all details of the utility's economic life. A particular focus of that regulation is setting the rates that consumers will be charged. The rate-setting process—which has been the subject of myriad cases in this Court—involves "the necessity of securing, organizing and weighing data adequate to make a complex economic decision [as the substitute for a] market [decision which] rests upon the action of many independent decision makers . . ." C. Phillips, *The Regulation of Public Utilities* (1984) at 154, *quoting* former FCC Commissioner Loewinger.

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[2] It is the general consensus of economists that the primary, even though not the sole, distinguishing feature of a public utility enterprise is to be found in a technology of production and transmission which almost inevitably leads to a complete or partial monopoly of the market for the service. Public utility regulation, if chosen in preference to outright public ownership, is therefore said to be a substitute for competition. [J. Bonbright, *Principles of Public Utility Rates* (1961) at 10]. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 n. 8 (1974) ("[P]ublic utility companies are natural monopolies created by the economic forces of high threshold capital requirements and virtually unlimited economy of scale. . . . Regulation was superimposed as a substitute for competition . . ."); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 383 (1973) (Stewart, J., concurring in part and dissenting in part).

Students of the commissions created to carry out this difficult regulatory task have found that these agencies often become over time so closely allied with the regulated companies as to be converted into an industry "captive." This occurs in part because the technical information and complex concepts that are the basis for ratemaking decisions are largely in the hands of the regulated companies. C. Phillips, *supra*, at 165; B. Mitnick, *The Political Economy of Regulation* (1980), at 95-96, 206 *et seq.* As Professor Mitnick explains:

> [I]n a partial theory explaining the development of a predisposition by regulators to make decisions and take actions consistent with the preferences of the regulated industry . . . [i]nformation plays a central role . . . The complexity of the industry's technology . . . means that the information needed to make regulatory decisions will be complex. The . . . expertise [the] industry also possesses . . . lead[s] to a condition of "information impactedness" between the industry and the regulatory agency . . . Information impactedness . . . and information complexity . . . can lead to industry control of the information needed for regulation [and thereby] to co-opting the regulators [by] making the regulators perceive the regulatory task through an information framework and orientation provided by the industry [B. Mitnick, *supra*, at 209-211. *See also Jackson v. Metropolitan Edison*, 419 U.S. at 363 (Douglas, J., dissenting) (discussing the "captive agency" problem and citing Federal Trade Commission, *Utility Corporation Report*, S. Doc. 92, 70th Cong., 1st Sess. (1936).]

California, in common with other States, has sought to counter these influences in part by encouraging broad ratepayer participation in the regulatory process.[3] To

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[3] *See*, for example, Cal. Pub. Utilities Code § 454 (emphasis supplied):

> (a) . . . Whenever any electrical, gas, heat, telephone, water, or sewer system corporation files an application to increase any rate of charge, other than an increase reflecting and

further that end, the PUC, after a careful review of its own regulatory procedures, concluded that the task assigned to the Commission by the State of setting rates and making other decisions concerning the essential services offered by public utilities could not be accomplished simply by hoping that individual ratepayers would be both motivated to assume the responsibility, and qualified for the task, of countering industry presentations. Rather, the Commission perceived the need—if the substitution of a broad-ranging inquiry into the relevant economic facts and concepts for market competition is to work—for a vigorous, informed ratepayer voice at its ratemaking and other proceedings:

> There is no question that participation by representatives of consumer groups tends to enhance the record in our proceedings. The California Supreme Court reminded us of that in deciding *Consumers' Lobby Against Monopolies (CLAM) v. Public Utilities Commission*, 25 C.3d 891 (1979), which found that the Commission has jurisdiction to award attorneys' fees and costs to consumer representatives

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passing through to customers only increased costs to the corporation, for the services or commodities furnished by it, *the corporation shall furnish to its customers affected by the proposed increase notice of its application to the commission for approval of the increase.* The corporation may include the notice with the regular bill for charges transmitted to the customers within 45 days of the 60-day billing cycle. The notice shall state the amount of the proposed increase expressed in both dollar and percentage terms, a brief statement of the reasons the increase is required or sought, and the mailing address of the commission to which any customer inquiries relative to the proposed increase, including a request by the customer to receive notice of the date, time, and place of any hearing on the application, may be directed.

* * * *

(c) . . . *The commission shall permit individual residential public utility customers affected by a proposed rate increase to testify at any hearing on the proposed increase,* except that the presiding officer need not allow repetitive or irrelevant testimony and may conduct the hearing in an efficient manner.

under certain circumstances. In reaching this conclusion, the Court noted:

> "[T]he staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing (Pub. Util. Code Section 1731) or judicial review (*Id.*, Section 1756) of Commission decision." (25 C.3d 891, 980.) [4]

We hasten to add that our staff is a dedicated professional, highly competent one. The observation of the Court merely points out an inevitable facet of the unique position of our staff. There can be no denying that the principal representative of the residential and small business ratepayer is in fact the staff, whose job it is to challenge a utility's showing and recommend the minimum rates necessary to ensure adequate service and provide a reasonable return to the utility. The staff, however, may not pursue appeals. Thus, if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in our proceedings. . . .

Furthermore, while we believe that the opportunities for compensation for participation in our pro-

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[4] In the *CLAM* opinion, the California Supreme Court rejected as having "a hollow ring to it" the argument that "the commission staff adequately represents the public." 25 Cal.3d at 908. That court emphasized:

> [P]ublic interest intervenors such as TURN speak for a substantial segment of the population that otherwise may go unheard. As mentioned above, the communication staff cannot fully and adequately represent all facets of the public interest, and in some instances . . . may fail to discern the ratepayers' interests. Public interest intervenors therefore fill a gap in the ratemaking process.
>
> The special contributions of groups such as TURN must also be considered. Effective participation in complex commission hearings . . . requires technical expertise and continuous scrutiny of various proposals and rulings. Groups such as TURN provide that expertise and scrutiny as all counterweight to the views expressed by the utilities. [25 Cal.3d at 911.]

ceedings help assure the development of a full and fair record, we recognize the merit of the . . . contention that such opportunity may seem illusory to an individual ratepayer. What the complainants propose is another alternative, which relies neither upon increased funding through rates nor upon compensation under one of our present procedures. It appears that there are many ratepayers in [the] service area who would relish the opportunity of belonging to an organization which could afford to hire people with technical expertise to represent their particular interests in proceedings as technical as most of our major cases are. In fact, many of these ratepayers have written to us to express their support of this . . . proposal. D.83-04-020, mimeo., pp. 7-8 [J.St.App. A-49; *see also id.* at A-160.]

On this basis, the Commission determined (J. St. App. A-49) to provide an opportunity for proven representatives of ratepayer interests to communicate with their ratepayer constituency through the only means of communication that regularly flows to that constituency, and that does so as a direct result of their status as ratepayers—*viz.*, the billing envelope each ratepayer receives monthly, and through which notice of ratemaking proceedings is transmitted.[5]

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[5] The PUC based its decision to allow TURN access in part on the ground that

> TURN has demonstrated in its testimony and in past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population . . . Furthermore, it has adequately demonstrated during this hearing that it cannot participate in all the regulatory proceedings of PG&E it might otherwise participate in without significant financial hardship. [J.St.App. A-15.]

Further, the Commission has provided that all "funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E" (J.St.App. A-18), and that TURN is required "to prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process [describing] TURN's efforts on behalf of PG&E's residential ratepayers in the past year" (*id.*).

On the only occasion in which a group other than TURN sought access to utility billing envelopes, access was denied because

> The [applicant] Committee has not participated in our proceedings, and its complaint does not suggest that it ever will participate . . . Access to the billing envelope has . . . been granted to groups organized specifically to represent ratepayers in our proceedings. [Decision No. 84-10-062, J.St. App. A-160.]

The Commission's determination reflects the fact that the billing envelope is itself a product of the regulatory process, in the sense that the Commission requires that regular bills be sent, specifies what information must be included on the bills, may require more than one company to send joint bills in a single envelope, and has required utilities to include in the envelope various PUC-prescribed inserts providing information on many utility-related matters. *See* PUC Motion to Dismiss, at 10-14. The costs of billing and of the billing envelope are consequently considered operating costs of the utility, which means that, in calculating the rate base upon which PG&E's permitted rate of return is computed, those costs are included. J. St. App. 46. *See generally* P. Garfield & W. Lovejoy, *supra*, at 44-56. Because the United States Postal Service's minimum postage charge covers a mailing of up to one ounce of material, there may be extra space in the billing envelope after provision is made for all the PUC's basic billing and notice requirements. That space, whose use is at issue here, is therefore available without any additional cost. (There is, however, no guarantee that the bills themselves will not be so lengthy, or the required inserts in any one month so many, that there will be less than one ounce of PUC-required material in any particular billing envelope.)

II. The Relevance of State Action Principles. PG&E's contention here is that the extra space in the billing envelope, despite its genesis in PUC regulations and its inherently transitory nature, is the utility's private prop-

erty, and that the PUC is therefore precluded by the Constitution from designating this natural medium of communication to ratepayers as a means of promoting a vigorous presentation of all potentially useful viewpoints in the Commission's regulatory proceedings.

It is important, at the outset, to separate the question raised by that contention from the quite distinct question as to whether the First Amendment, of its own power, ever *requires* that individuals or groups be granted access to private property for communicative action. That question necessarily turns, as this Court has had several occasions to emphasize, on a determination as to whether there is, in either the character of the property involved or the nature of an applicable governmental regulatory scheme, sufficient state action to trigger application of the First Amendment. "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). *See also Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94 (1973); *Marsh v. Alabama*, 326 U.S. 501 (1946).

In this instance, it is clear from this Court's precedents that there is nothing in PG&E's status as a public utility that would support the conclusion that the utility is *required* by the First Amendment to grant access to the billing envelope to any other person. This Court has made it plain that the actions of a public utility are not state actions:

> [That a company is] a heavily regulated, privately owned utility, enjoying a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the . . . Public Utility Commission found permissible under state law . . . is not sufficient to connect the State to [the company's] action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment. [*Jackson v. Metropolitan Edison*, 419 U.S. at

> 358; *cf. Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594 (1976) (public utility policy not instigated by the state is not within the state action immunity from the antitrust laws).]

However, while the state action issue is critical in determining whether access to the billing envelope is required by the First Amendment, that issue is in no way determinative of the separate issue whether a "statutory or common law [which] . . . extend[s] protection or provide[s] redress against a private corporation who seeks to abridge the free expression of others" (*Hudgens*, 424 U.S. at 513) is inconsistent with the Constitution. For example, this Court, after determining that there is no First Amendment right of access that overrides, in whole or in part, broadcast media restrictions on the purchase of broadcast time by private entities (*CBS v. DNC*, *supra*), later upheld as consistent with the First Amendment a congressionally-imposed requirement that federal candidates for office be permitted to purchase reasonable amounts of broadcast time. *CBS, Inc. v. FCC*, 453 U.S. 367, 394-397 (1981). Similarly, while restrictions imposed by shopping centers upon those who would engage in communicative activity are not state action and therefore do not violate the First Amendment, the Constitution does not prevent a State from deciding that its citizens' interests in free communication are best served if shopping centers are required to allow reasonable communicative activity. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). In short, the government has at least some power to enhance communication among the citizenry beyond that affirmatively protected by the First Amendment in a fashion that affects private parties' control over communication on their property.

Indeed, *Pruneyard* shows that certain of the considerations that have been advanced and rejected as a justification for a First Amendment right of access to property controlled by a private entity provide a valid justification for governmental action that enhances communication on private property. *Hudgens* rejected the proposition that

the fact that "a large shopping center is 'open to the public,' [and] serves the same purposes as a 'business district' of a municipality" (424 U.S. at 519, *quoting Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972)), is a ground for providing First Amendment protection to individuals seeking to engage in communicative activity on the shopping center. The shopping center owners' argument in *Pruneyard* that California may not, consistent with the First Amendment, require such owners to permit communicative activity on their premises, was, however, rejected in turn, in part because "the shopping center . . . is . . . a business establishment that is open to the public to come and go as they please." 441 U.S. at 87; *see also id.*, at 95 (White, J., concuring); *id.*, at 101 (Powell, J., concurring).

Thus, as we have seen, neither the natural monopoly status of public utilities, nor the pervasive governmental regulation of ratemaking generally, and of the billing process in particular, identify PG&E with the government sufficiently to fulfill the state action requirement. Nonetheless, those same factors may well be—and, we suggest, are in fact—pertinent considerations in determining whether or not PG&E is protected by a constitutional barrier when the government determines that the proper functioning of the public utility regulation system requires that communication among ratepayers concerning that system be enhanced by use of a medium—the billing envelope's "extra space"—generated and closely controlled by the PUC in the ratepayers' interest and paid for by the ratepayers.

III. The Claimed Absolute First Amendment Right Not To Further Another's Speech. PG&E does not suggest that the PUC access rule works any infringement of the utility's property interests that runs afoul of the Fourteenth Amendment. But PG&E's First Amendment contentions turn out to be, upon close examination, little more than restatements in another guise of the property-based arguments the utility has wisely decided not to

raise directly.[6] PG&E's central point is that by permit-

[6] The reasons there is no property rights infringement here are similar to those the Court found controlling in *Pruneyard*, and turn on both the nature of the property in question and the character of the access requirement.

PG & E's interest in the billing envelope is a very odd sort of property interest at best. "Extra space" in the envelope is a fortuitous by-product of two sets of governmental regulations—those of the PUC (requiring periodic billing and prescribing the contents of the billing envelope) and those of the Postal Service (setting the minimum postage rate on the basis of one ounce of material). As such, the "extra space" could be eliminated either by changes in PUC requirements—mandating, for example, more lengthy bills, or more informational inserts, or cost-saving devices such as semi-monthly billing or joint billing by several utilities—or by changes in Postal Service regulations—setting, for example, a new minimum rate for one-half ounce of material.

Moreover, PG & E's interest in the envelope itself is inherently transitory rather than permanent; the envelope is purchased in order to be mailed, and once mailed no longer belongs to PG & E but to the recipient, the individual at whom the TURN insert is directed. Cal. Civil. Code § 985.

Further, PG & E obviously has no cognizable interest in "excluding all persons [from] its property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982). The primary use of the property is to communicate commercial information in a manner prescribed by the government to another person, the ratepayer, rather than to use the property in a way permanently closed to others. And, for Fifth and Fourteenth Amendment purposes, no distinction can be drawn between a PUC-prescribed message and a PUC-prescribed inclusion of an individual's or a group's message.

Given this attenuated property interest, there is, as in *Pruneyard*, neither an uncompensated taking of property nor a denial of property without due process when the government creates a limited access right to serve substantial governmental interests.

First, there is no interference with "reasonable investment-backed expectations." *Pruneyard*, 447 U.S. at 84. The central and prescribed purpose of the billing envelope, is to convey the monthly bill PG & E is required to send. Postal rates are currently set by the ounce; PG & E therefore would have to pay for the full ounce to convey its bills even if the utility never included anything else in the envelope. Including the TURN inserts in no way interferes with the use of the envelope for billing purposes or increases the cost of billing. And, as we have seen, PG & E has no reasonable

ting TURN a limited right through the billing envelope to communicate with the ratepayers whose interests that association represents, the PUC violates the utility's First Amendment right not to further another's communicative activity. Brief for Appellants at 14. Presumably, by articulating this claim as one under the First Amendment rather than as one under the Fifth and Fourteenth Amendments, PG&E hopes to be the beneficiary of a stricter standard of scrutiny than is

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expectation that the utility will be assured use of any extra space in the billing envelope on a monthly basis for its own purposes unrelated to billing. In short, while PG & E may have a "unilateral expectation or an abstract need" to use the billing envelope to transmit its own newsletter without cost to the utility, that expectation, which is neither reasonable nor investment backed, cannot be deemed the "reasonable investment-backed expectation" protected by the Fourteenth Amendment. *See Ruckshaus v. Monsanto Co.*, —— U.S. ——, 52 L.W. 4886, 4891 (June 26, 1984).

Second, PG & E's interest in the billing envelope and the extra space within the envelope is, for the reasons surveyed above, inherently transitory and limited. There is therefore no meaningful sense in which a "permanent physical occupation" (*Loretto*, 458 U.S. at 434) of property of this kind can occur; any "invasion" is necessarily temporary, because the property interest *itself* is. Thus, in this case as in *Pruneyard*:

> Since the invasion was temporary and limited in nature, and since the owner has not exhibited an interest in excluding, all persons from [its] property, "the fact that [the inserts may have] 'physically invaded [PG & E's] property cannot be viewed as determinative." [*Loretto*, 458 U.S. at 434.]

Lastly, as in *Pruneyard*, there is no doubt that the substantive due process guarantee of the Fourteenth Amendment is satisfied: PUC's determination that effective regulation of utility rates is hampered by the industry's control of relevant information is, as we have seen, supported by the weight of scholarly opinion (pp. 6-7, *supra*); the Commission's further conclusion that this defect in the ratemaking process will be alleviated in part by encouraging development of effective ratepayer representatives through the medium traditionally used by the PUC itself to communicate with ratepayers is not unreasonable but, instead, manifestly has "a real and substantial relation" to the goal of effective utility regulation. *Pruneyard*, 447 U.S. at 85, *quoting Nebbia v. New York*, 291 U.S. 502, 525 (1934).

applicable under the latter. But First Amendment analysis differs to this degree from that pertinent under the property clauses because, and to the extent that, values entirely distinct from those that are denominated by the term "property" are at stake. And, as we now show, none of these separate First Amendment values are impaired by the PUC order at issue here.

This Court has not had the occasion to explore in any exhaustive way the appropriate relationship between the constitutional protection accorded the right to speak and that accorded the right not to speak. Rather, the Court has in a total of three cases upheld a claim based on that negative First Amendment right in light of the particular circumstances presented. (*Board of Education v. Barnette*, 319 U.S. 624 (1942); *Wooley v. Maynard*, *supra*; *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *see also Ellis v. BRAC*, —— U.S. ——, 52 L.W. 4499 (April 25, 1984)), while rejecting such a claim in two other instances (*Pruneyard*, *supra*; *Zauderer v. Office of Disciplinary Counsel*, —— U.S. ——, 53 L.W. 4587 (May 28, 1985).)

These few decisions are sufficient, however, to make it clear that in this context as in others, affirmative constitutional rights do not, in a mechanical fashion, automatically imply their precise obverse. *Compare*, *Singer v. United States*, 380 U.S. 24, 34-35 (1965); *Faretta v. California*, 422 U.S. 806, 819, n. 15 (1975). Zauderer, for example, was held to have broad rights under the First Amendment to advertise but was held also not to have the negative right to refuse to disclose state-prescribed information in those adversements. *Zauderer*, *supra*, 53 L.W. at 4549. And while the owner of the Pruneyard was constrained to permit political handbilling by others on his property, he presumably retains the affirmative right to use his own property to forward ideas he wishes to express. As these illustrations show, the design of the First Amendment supports implication of inverse rights only in the situations in which

the implication furthers that Amendment's large purposes.[7]

The two recognized purposes of the First Amendment are: (1) "'to secure the widest possible dissemination of information from diverse and antagonistic sources' [so as] 'to assure unfettered interchange of ideas for the bringing about of political and social change desired by people'" (*New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)); and (2) to protect and enhance "[t]he individual's interest in self-expression" (*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, n.12 (1978)).

The interest in remaining isolated from the expressive activity of others, and in declining to communicate at all, is for the most part divorced from the "marketplace of ideas" purpose of the First Amendment. An individual who refuses to express his or her views is quite obviously not enhancing but contracting the full discussion of matters of public concern which it is a primary purpose of the First Amendment to promote.

PG&E does, to be sure, attempt to state its objection to the fact that ideas opposed to its own may be magnified in volume and importance through access to the billing envelope in terms that draw on the marketplace

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[7] Thus, even if *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980), is read as granting plenary First Amendment protection to a utility's right to use a billing envelope for its own speech, that determination is not informative on the quite separate question whether the government has the authority to require that others be allowed the same privilege.

Indeed, it is far from clear that *Con Ed* grants utilities a plenary right to use billing envelopes for their speech. For *Con Ed* does not rule out the possibility that a utility commission could limit the billing envelope only to bills and prescribed notices, leaving *all* other utility communications to be sent separately. For the *Con Ed* decision emphasizes that, instead of doing so, the Public Service Commission engaged in the selective content-based regulation the First Amendment most certainly prohibits by banning *only* utiilty inserts concerning "controversial issues of public importance." 447 U.S. at 533, 535, 537-38.

of ideas principle. It is well-settled that in general the First Amendment does not permit government to "perfect" that marketplace by silencing some in order to enhance the relative voice of others. *Bellotti*, 435 U.S. at 791 n.30; *Buckley v. Valeo*, 420 U.S. 1, 49 (1976). It is therefore argued that by the same token the government may not upset the balance by subsidizing speech. That argument fails because the Constitution does not guarantee a marketplace of ideas financed solely through private capital.

Thus, in *Regan v. Taxpayers with Representation*, 461 U.S. 540 (1983), the Court refused to allow one lobbying group to end a government subsidy granted to another group for lobbying purposes. The Court emphasized that "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law . . . ." and that "[w]here governmental provision of subsidies is not aimed at the suppression of dangerous ideas . . . its power to encourage actions deemed to be in the public interest is necessarily far broader." 461 U.S. at 550. The same result would necessarily follow if any of the myriad varieties of governmental financial support for communicative activity were challenged by groups not so favored on the basis that their right to speak is hampered—at least in comparative terms—by the fact that others are enabled by governmental assistance of some kind to speak as well. For the marketplace distortion argument is particularly suspect where, as here, the purpose and effect of governmental action is "not to abridge, restrict or censor speech but rather . . . to facilitate an enlarged public discussion [and therefore to] further[] First Amendment values." *Buckley v. Valeo*, 424 U.S. at 92; *see also, Storer v. Brown*, 415 U.S. 724 (1974). In short, as this Court has held, the Establishment Clause of the First Amendment pertains only to religion, and not to speech generally. *Buckley v. Valeo*, 424 U.S. at 92.

It is, therefore, not surprising that the other set of First Amendment values, concerning the preservation

of individual integrity," has been the focus of the negative First Amendment rights cases. In *Barnette* the Court was concerned to protect "the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control" (319 U.S. at 642); and in *Wooley* the Court characterized the interest at stake as "the broader concept of 'individual freedom of mind'" (430 U.S. at 714). *See also Abood*, 431 U.S. at 234-35; *compare Elrod v. Burns*, 427 U.S. 347, 356-57 (1976).

Barnette and *Wooley* themselves make clear that it is not to be lightly inferred that governmental activity is aimed at imposing such "official control." Both cases expressly recognize that the First Amendment injury found in those cases does *not* arise simply from the fact that the government was sponsoring communicative activity with taxpayers' money. Thus, in *Barnette*, the Court stated: "National unity as an end which officials may foster by persuasion is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." 319 U.S. at 640. And, in *Wooley* as well, the Court recognized that where "The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism . . . the State may legitimately pursue such interests in any number of ways." 430 U.S. at 717. *See also Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion); *id.*, at 876 (Blackmun, J., concurring); *id.* at 889 (Burger, C.J., dissenting); *id.* at 896-97 (Powell, J., dissenting); *id.*, at 909, 915 (Rehnquist, J., dissenting).

In *Prunyard* the Court began to define with some particularly the limits of the right not to speak and to give content to its consistent recognition that the government has the authority to enhance speech in ways that do not trench on that negative right. The *Prunyard* Court noted that " *Wooley* . . . was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used 'as

part of his daily life,' and refused to permit him to take any measures to cover up the motto even though the Court found that the display of the motto served no important state interest." 447 U.S. at 87. And the Court characterized *Barnette* as a case that "involved the compelled recitation of a message containing an affirmation of belief." 447 U.S. at 88. And in upholding the California access rule at issue in *Pruneyard*, the Court explained

> Here, by contrast, there are a number of distinguishing factors. Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law. [447 U.S. at 87.]

Following the path laid out in *Pruneyard* we now show that there are three critical factors which together demonstrate that the right protected in *Barnette*, *Wooley* and *Abood* is not involved here.

(a) PG&E is hardly in a position to claim infringement of its "sphere of intellect and spirit" or "freedom of mind." *Barnette*, 319 U.S. at 642. To ascribe to PG&E, a business corporation, an "intellect", a "spirit", or a "mind" is to confuse metaphor with reality. Corporations do, to be sure, enjoy the First Amendment's protection against government censorship. *Bellotti, supra.*

But the *Bellotti* Court declined the invitation to hold that "corporations have the full measure of rights that individuals enjoy under the First Amendment." 435 U.S. at 779, n.14. Rather, the Court there recognized that "Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against self-incrimination . . . or . . . the enjoyment of the right to privacy." *Id.*[8] As both *Bellotti* and *Con Ed* expressly recognize, and as the various opinions in *Bellotti* discuss at some length, a business corporation's First Amendment rights derive from "the inherent worth of the [corporation's] speech in terms of its capacity for information" (435 U.S. at 777), and *not* from "[t]he individual's interest in self-expression . . . a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge" (*id.*, at 777 n.12). *See also, id.* at 783 (emphasizing again that "the First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw"); *id.* at 894 (White, J., dissenting). In short, the nature of PG&E as an institution, like the nature of the shopping center as a location, negates any claim that a direct infringement on the property owner's intimate, personal rights is here involved.[9]

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[8] The two "purely personal" rights mentioned in *Bellotti* are closely allied in the values granted protection to the right recognized in *Wooley, Barnette* and *Abood*: All three are at bottom concerned with assuring a private enclase within which each individual may thrive and grow in heart and mind. *See Bellotti*, 453 U.S. at 779 and the cases cited there.

[9] While there is no need in this case to explore the question in detail, we would suggest, as did Justice White, for himself and Justices Brennan and Marshall, in his dissent in *Bellotti*, that corporations or associations organized in whole or in part for the purpose of engaging in communicative activity are in a different position with regard to the self-expression aspect of the First Amendment than are corporations organized as banks or public utilities:

> [A]s this Court has recognized, *NAACP v. Button*, 371 U.S. 415, there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits. Shareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion. [453 U.S. at 805.]

Consequently, the observations in the text regarding the application of negative First Amendment rights are confined to ordinary business corporations, which are, at their core, economic institutions and not vehicles for enhancing individual expression.

We note as well that the individuals who work for or represent a business corporation certainly retain their inverse First Amendment rights. There may be situations in which a government-created access right for others intrudes impermissibly on the right of those individuals, as individuals, to refrain from speech; in this case, however, the billing envelope is in no way identified with any individual.

[10] PG&E has for some time chosen to include its newsletter, the *Progress*, in the billing envelope; we discuss the significance of that choice for this case at pp. 24-27, *infra*.

(b) This case involves not only a commercial organization but a fundamentally commercial, impersonal communication: an envelope carrying a statement of accounts, together with official regulatory announcements which PG&E is *required* by PUC rules to mail monthly.[10] The nature of these materials reflects the fact that the utility-ratepayer relationship itself is fundamentally a commercial relationship. As this Court recognized in *Zauderer, supra*, negative First Amendment rights are particularly weak when a basically commercial transaction and a basically commercial message are involved. In such a setting, there is no meaningful sense in which individual expression may be said to be compromised by

government regulation, and thus there is no basis for invoking the self-expression prong of First Amendment jurisprudence.

(c) The PUC's purpose in this case is at the furthest remove from the didactic purpose the government sought to pursue in *Barnette* and in *Wooley*. The Commission's goal is to provide a means of communication that increases the diversity of views expressed in order to enhance the proper functioning of its own regulatory proceedings. And those proceedings are a quintessential instance of a First Amendment governmental forum, albeit a limited one, whose very essence is the exchange of conflicting viewpoints. *Cf. Madison Sch. Dist. v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). Indeed, the Commission's action here, far from creating a danger of official orthodoxy, is intended to decrease that danger by assuring that PG&E is not by default the only speaker the government hears.

In sum, there is no significant interference with "the sphere of intellect and spirit" where a business corporation is required to allow the transitory use of basically commercial property for communication with or among individuals or groups with a governmentally recognized role (or potential role) in the regulation or governance of that company. Put another way, insofar as PG&E's complaint is that TURN should not be able to use the billing envelope because that envelope in some sense "belongs" to PG&E, the utility is doing nothing more than reasserting the very property rights that are not strong enough to support a Fifth and Fourteenth Amendment challenge to the PUC order. *See* pp. 15-16, n.6, *supra*. Masquerading that property claim as one under the First Amendment does not change the result.

IV. The Alleged Adverse Effect On PG&E's "Editorial Freedom." PG&E suggests—relying on *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)—that whatever the legal situation would be if the billing envelope had been used solely for bills and PUC-required notices this case is different because the utility usually includes

its newsletter, the *Progress*, in the envelope. In evaluating this contention, it is important to be considerably more precise than PG&E has been in evaluating the connection (or, as it turns out, the lack thereof) between the PUC order and the utility's publication of the *Progress*.

PG&E, it should be recognized at the outset, is not being ousted by the PUC order from using the billing envelope to transmit the *Progress* whenever the utility wishes to do so. This case in no way presents a situation in which a speaker is being relegated to a less favorable mode of, or to a less desirable location for, communication. PG&E will be able to continue to communicate precisely as the utility has done before, taking advantage of the fact that ratepayers must open their bills and therefore are more likely to read material mailed with the bill than material mailed separately. *Compare, e.g., City Council v. Taxpayers for Vincent*, —— U.S. ——, 52 L.W. 4594 (May 15, 1984); *Schneider v. State*, 308 U.S. 147 (1939).

PG&E is disadvantaged only to the extent the utility may by reason of the Commission access rule have to pay extra postage to transmit the *Progress* more often than at present. But there is even now no assurance that there will be space in the billing envelope for the *Progress* after the bills and PUC-required notices are included. And the postage rate structure is not, in any event, set by the PUC; PG&E might also have to pay more postage if the Postal Service decreased the weight carried for the basic mailing charge. Consequently, while the PUC order may result in increased costs to PG&E for its publication, that result is speculative, fortuitous, and controlled by factors that in the final analysis are outside PUC's hands.

Putting these considerations to the side, it is decisive in any event that the Commission access rule does not turn on whether PG&E includes the *Progress* in the billing envelope. The central reason TURN's access has been approved—to provide for an effective ratepayer voice in

PUC proceedings—would not vary in importance if PG&E had never published the *Progress* or ceased publishing the newsletter tomorrow. Nor would the billing envelope be a more or less appropriate vehicle for communication between ratepayer representatives and their constituency if PG&E never used the envelope at all as a means of transmitting anything beyond required bills and notices.

Consequently, the PUC access rule does not penalize speech nor could that rule possibly "chill" PG&E from speaking in the future by causing the utility to choose self-censorship rather than the option of speech that generates a right to reply.[11] In this regard, this case is like *Pruneyard*, *supra*, and *CBS v. FCC*, *supra*, in that the access requirement in no way turns on whether or not the complaining party itself chooses to speak, and the requirement therefore has no conceivable influence on the complainant's decision whether to speak. In contrast, in *Tornillo*, *supra*, the fact that a newspaper chose to address a particular subject in a particular way did trigger access; it was this feature of the state law that caused its invalidation:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. [418 U.S. at 257.]

The Court in *Tornillo* did add that the access requirement would impose added costs on the newspaper. 418

[11] That, as a historical matter, the PUC access rule came after the Commission had expressed concern about PG&E's use of the billing envelope space generated by ratepayer funds to transmit the utility's newsletter is entirely irrelevant. Whatever the result would have been if the PUC had, as was considered, limited PG&E's use of that envelope, the rule actually adopted, and its rationale, is completely divorced from concern with the utility's newsletter and the means of transmitting that newsletter.

U.S. at 256-57. *Tornillo* does not suggest, however, that any governmental regulations that increases the cost of printing a newspaper is a *per se* First Amendment violation. Obviously, all manner of governmental regulations may make speaking more expensive; there is no First Amendment requirement that expression be cheap, or free. *See, e.g., Taxpayers for Vincent, supra*; *U.S. Postal Service v. Greenburgh Civic Assn.*, 453 U.S. 114. (1981). Rather, the problem in *Tornillo*, as the Court was careful to state, was not the possible increase in the cost of publishing the newspaper, but the fact that the increased cost was a "*penalty on the basis of the content of a newspaper* . . . resulting from the compelled printing of reply. . ." 418 U.S. 256; emphasis added.[12]

What this analysis demonstrates, once again, is that the First Amendment cannot be used as a surrogate for fundamentally property-based concerns: Where an access requirement is triggered by one entity's speech, then there is indeed a danger to the system of free expression. But where, instead, access to private property is provided to a speaker for reasons entirely independent of any one else's communicative activity, and in no way denies the owner his right to speak, the First Amendment does not guarantee against the purely economic injury that the owner's communications costs may rise, any more than the free speech guarantee insulates communications companies from taxes uniformly imposed.

V. The PUC's Selection Criteria. PG&E's final contention is that the access rule is invalid because the PUC

[12] *Tornillo* also turns on the "intrusion into the function of editors" worked by telling a newspaper what to print. *Id.* at 258. But the billing envelope is in no sense a coherent editorial experssion. Rather, its content is already dictated by the PUC, and consists of material which is at best commercial speech, and not, as in *Tornillo*, expression at the center of First Amendment concerns. In short, one cannot sensibly speak of the "editorial control and judgment" (*id.* at 258) of the individuals who compile PG&E's bills each month. The special concern *Tornillo* exhibits for the integrity of the free press therefore plays no part here.

will necessarily have to make selections among various groups and individuals in order to administer that rule.[13] Since no group other than TURN has requested access, there is no occasion in this case to determine whether one or another selection principle would be valid. Rather, the only way this consideration could be pertinent is if there is an inviolable rule against governmental selection of certain groups of individuals as the speakers where the government regulates access to a means of communication.[14] If there is no such rule the PUC order may not be invalidated on the speculation that when

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[13] There is also the claim that the decision to permit TURN to use the billing envelope is itself impermissibly content-based, evidencing a preference for the views of TURN over those of PG&E. As we have already suggested, the record is simply inconsistent with this contention. The PUC made no judgment as to whether TURN's views are better than PG&E's, but only that TURN's view are likely to be *different* from PG&E's and are therefore likely to aid the PUC in its pursuit of all pertinent regulatory information. Of course, the Commission will eventually have to make content-based regulatory decisions and in so doing determine whose views (or what compromise) will prevail. Thus, the PUC was making a choice among speakers in the same way, and for the same reason, that this Court chooses not to hear from only one party to a case for the entire one hour allocated to oral argument—*viz.*, so that its final decision, which will choose between the positions of the parties, is as well-informed as possible. *See Madison Sch. Dist.*, 429 U.S. at 180 (Stewart, J., concurring); *Con. Ed.*, 447 U.S. at 545-546 (Stevens, J., concurring).

[14] In *Con. Ed.* this Court rejected an analogy to the public forum cases where no private party was asserting an access right to property controlled by the government and the only issue was whether a utility may itself use the billing envelope. 447 U.S. at 539-540. But this *is* a case in which the access rights of a private party (potentially, several private parties) is involved. And while the government does not *own* the property in question, if the access right is upheld, the PUC would control access to the billing envelope, just as the Postal Service controls access to mailboxes the Service does not own. *Greenburgh Civic Assn., supra.* The same general selection rules should control where the government is regulating access to its own property and where the government is regulating access to private property; both *Greenburgh* and *Pruneyard, supra,* so indicate.

faced with the question, the Commission ay choose an invalid criteria—such as its agreement or disagreement with a group's point of view—rather than a valid one.

That there is no *absolute* rule against governmental selection of speakers where the government creates a means of communication or expression for private persons could not be more clear. Three times in the last two years, in cases remarkably similar to this one in this respect, this Court has had occasion to so hold. *Perry Education Assoc. v. Perry Local Educators' Association*, 460 U.S. 37 (1983); *Minnesota State Board for Community Colleges v. Knight*, —— U.S. ——, 52 L.W. 4204 (Feb. 21, 1984); *Cornelius v. NAACP Legal Defense and Education Fund*, —— U.S. ——, 53 L.W. 5116 (July 2, 1985).

In *Perry*, the question was whether the exclusive representative of a school board's employees could have exclusive access to the school's internal mail system. The Court first distinguished the forum there from the "traditional public forum", *viz.* "places which by long tration or by government fiat have been devoted to assembly and debate." 460 U.S. at 45. In public forums, content-based or identity-based exclusion can only be justified by a compelling state interest, and then only if "narrowly tailored." *Id.* But, where, as here, the government creates a new kind of medium for communication, there is no general proscription against identity or content distinctions. Such a forum may be created "for a limited purpose such as use by certain groups . . . or . . . the discussion of certain subjects" and the government "may make distinctions in access on the basis of subject matter and speaker identity [as long as] these distinctions are reasonable" and are not "intended to discourage one viewpoint and advance another." *Id.* at 46-49. Distinctions based on the *status* of a particular person or entity in the overall system to which access is sought may not, moreover, caterogically be regarded as forbidden viewpoint distinctions and condemned as such. *Id.*, at 49. And, as both *Perry* and *Knight* demonstrate,

the government enjoys a great deal of leeway in choosing which representatives of the public to consult during the policy making process and in providing those representatives adequate means to reach their constituents.

It is unnecessary to go beyond these general principles in this case. The billing envelope is surely not a traditional public forum. And, whether that envelope is viewed as a limted public forum or as a nonpublic forum, the PUC could at least limit access to groups or individuals with a potential for participation in ratemaking proceedings, since that is the underlying reason for providing the access right. Further, should the need to do so develop, the PUC could limit the content of the inserts to that relevant to ratemaking proceedings particularly, or to public utility regulation generally. *Perry*, 460 U.S. at 46 n.7. Thus, the PUC will be able to limit acecss to the billing envelope to persons and to materials pertinent to its overall regulatory purpose; that is all that must be determined at this juncture. Because the necessity to make further distinctions among potential speakers has not yet arisen, issues of the kind that divided the Court in *Cornelius*, *supra*, are not ripe to be addressed in this case.

CONCLUSION

For the reasons stated above, the PUC Decision should be upheld.

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[14] The PUC has not in terms limited the content of TURN's speech to any particular subject. In *Perry*, the situation was the same: There was no explicit limitation to "messages related to [the union's] special legal duties." 460 U.S. at 53, n.13. The Court declined to view this failure to censor in advance as undermining the validity of the school board's grant of access. *Id.* Here, as well, the record demonstrates that TURN is a single-purpose organization, and therefore unlikely to use its privilege to discuss matters unrelated to utility-rate regulation. Further, all funds raised are limited to use in ratepayer representation in PUC proceedings. Thus, as in *Perry*, it is "[not] necessary to decide the reasonableness of a grant of access for unlimited purposes." *Id.*

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In the Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et.al.,
Appellees.

On Appeal from the Supreme Court of California

Brief of Amicus Curiae State of Oregon In Support of Appellee Public Utilities Commission of the State of California

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The State of Oregon, through its Attorney General, appears as *amicus curiae* in support of appellee California Public Utility Commission (CPUC or commission) to protect the *interests of the Oregon electorate*. By initiative legislation, the voters of Oregon have required the state's privately owned public utilities to include materials prepared by a simultaneously created consumer interest group in their customer billings. This voter-initiated requirement parallels the CPUC order that the appellant utility here claims violates its First Amendment rights. This popular mandate similarly is being challenged by an association of telephone utilities and by corporations providing gas and telephone service to Oregonians in a federal district court action for declaratory and injunctive relief (*Oregon Independent Telephone Ass'n, et al. v. Citizens' Utility Board of Oregon*, U.S. Dist. Ct. (Or.), Civil No. 85-875).

Oregon's voters thus have a significant stake in the proper resolution of the constitutional question presently before the Court. A comprehensive legislative program, recently adopted by the electorate to foster public awareness and involvement in issues relating to public utility regulation, is at risk. An essential feature of that program, *i.e.*, limited public access to utility bill mailings, erroneously has been called into constitutional question.

On November 6, 1984, the people of the State of Oregon, exercising the initiative power reserved to them by Or. Const. art. IV, § 1, created Oregon's Citizens' Utility Board (CUB) to

serve particular public interests. By this enactment, the voters expressly found

> that utility consumers need an effective advocate to assure that public policies affecting the quality and price of utility services reflect their needs and interests, that utility consumers have the right to form an organization which will represent their interests before legislative, administrative and judicial bodies, and that utility consumers need a convenient manner of contributing to the funding of such an organization so that it can advocate forcefully and vigorously on their behalf concerning all matters of public policy affecting their health, welfare and economic well-being.

Oregon Official 1984 General Election Voters' Pamphlet 9 (1984).

The Oregon CUB was designated an "independent non-profit public corporation"[1] possessing

> all rights and powers necessary to represent and protect the interests of utility consumers, including but not limited to the following powers:
>
> (a) To conduct, fund or contract for research, studies, plans, investigations, demonstration projects and surveys.
>
> (b) To represent the interests of utility consumers before legislative, administrative and judicial bodies.

---

[1] Contrary to the contention of *amici curiae* Pacific Northwest Bell Telephone Company, Pacific Power & Light, and Oregon Independent Telephone Association the participation of the Oregon Attorney General in this proceeding does not suggest "that all CUB actions (unlike TURN actions) are in fact actions of the state." *See* Brief of *amici curiae* Pacific Northwest Bell Telephone Company *et al.* at 2 n. 2. The Attorney General appears here only on behalf of the State of Oregon to represent the interests of its citizens as embodied in Oregon's CUB law. In the above-referenced local litigation challenging the constitutionality of Oregon's CUB law, CUB currently is represented by privately retained counsel.

Id.

The CUB law encourages broad consumer membership and involvement in the organization. Every Oregon resident 18 years of age or older is eligible for membership in the CUB upon contribution of at least $5 but no more than $100 per year to the CUB. The Citizens' Utility Board of Governors is directed to establish a method whereby economically disadvantaged individuals may become members without full payment of the yearly contribution. *Id.* at 9, 10. Initially, the Oregon CUB is managed by an interim board of directors appointed by the governor and subject to confirmation by the Oregon State Senate. After membership reaches 5,000, with a minimum of 100 members in each state congressional district, the members shall elect a board of governors, who are subject to recall by the members. *Id.* at 9, 10.

Under section 10, the most pertinent provision of the measure passed by Oregon's voters, each utility is required upon the CUB's request to include in its billings to utility consumers materials prepared and furnished by the CUB that conform in size to the dimensions of the utility's customary billing envelope. No utility may, however, be required to include CUB materials in its mailings more than six times per calendar year, or with less than 30 days' notice from the CUB. The CUB must reimburse the utility for a pro rata share of the postage charges for materials submitted by the CUB that exceed four-tenths of one ounce avoirdupois. The CUB must also reimburse the utility for other reasonable costs the utility incurs in complying with the act. *Id.* at 10.

Oregon's CUB law does not provide for any comprehensive state review of the materials submitted by the CUB to utilities. A utility may complain to the Public Utility Commissioner of Oregon that the CUB intentionally has made a material false statement in messages submitted to a utility for inclusion with a billing. The commissioner's sole authority in that circumstance is to review the complaint expeditiously and, upon determining that the CUB intentionally has made a material false statement, to notify the Citizens' Utility Board of Governors in writing of the false statement and the reasons why the commissioner determines the statement to be false. *Id.*

Utilities and their officers, employees, and agents are prohibited from interfering with the distribution of CUB materials in periodic utility billings, and from interfering with the right of utility consumers to contribute to the CUB. In addition, no utility may change its mailing, accounting, or billing procedures if the change will interfere with the CUB's ability to distribute its materials. These prohibitions are enforceable by criminal sanctions, as well as by equitable remedies. *Id.* at 10, 11.

Correlative to its authority to submit written materials for inclusion by utilities in periodic billings, the Oregon CUB has the power to intervene as of right or otherwise to participate in any agency proceeding whenever its board of governors determines that the agency proceeding may affect the interests of utility consumers. The CUB has standing to seek judicial or administrative review of agency action, and to intervene or

otherwise to participate in any proceeding for review or enforcement of an agency action where the board of governors determines that the action may affect the interests of utility consumers. *Id.* at 10, 11.

The voters of Oregon thus created a mechanism whereby, through an effective advocate with convenient access to consumer funding, utility consumers may participate before legislative, administrative, and judicial bodies in the creation of public policies affecting the quality and price of utility services so that those policies reflect their needs and interests. To forestall legal challenges that impede implementation of this program, the State of Oregon appears *amicus* to make a fundamental point: A state requirement that a public utility include consumer materials in periodic billings, as provided by CPUC's order under review and by Oregon's CUB law, does not implicate, much less violate, the utility's First Amendment freedoms.

SUMMARY OF ARGUMENT

The California requirement that its public utilities afford a certain consumer group periodic access to utility billing envelopes for dissemination of solicitational and informational messages does not abridge, in any constitutionally significant fashion, a public utility's freedom of speech. Neither the communicative nor the associational aspect of that First Amendment guarantee is implicated by the requirement. Appellant Pacific Gas and Electric's (PGandE) claims of speech infringement do not pass threshold analytical hurdles.

The CPUC's order does not detract from PGandE's free-om to communicate with its customers through the monthly billing envelope, whether or not material of Toward Utility Rate Normalization (TURN) is inserted in the envelope and regardless of the weight of TURN's inserts. The commission's order is neutral as to the content, subject matter, and amount of the utility's speech. The order merely gives rise to the possibility that PGandE may be deprived of free postage to distribute its message through its publication, *Progress*, a maximum of four times each year; yet PGandE itself concedes that this is not a deprivation of constitutional significance. Moreover, under its order, the commission will play no role in selecting, reviewing, or endorsing the content either of PGandE's or TURN's speech that appears in the billing envelope.

In addition, PGandE's contention that the commission indirectly and unconstitutionally will select the content of speech by selecting the speaker rests on a premature and ironically self-defeating assumption about the content of the consumer-oriented materials, and on PGandE's misinterpretation of the CPUC's order. Contrary to PGandE's contention, the CPUC's order does not conclude that the content of TURN's speech is better than that of PGandE's speech, or that TURN's speech should replace PGandE's speech in the billing envelope. Rather, by allowing TURN's message to appear alongside PGandE's message, the commission acted consistently with the First Amendment goal to encourage the expression of a variety of views, rather than only a single view, to aid the common search for truth.

The CPUC's order does not limit PGandE's rights to abstain from associating with the views of another or to refrain from disassociating itself from another's message. That order does not compel PGandE to contribute financial support for the dissemination of ideological views it finds repugnant. Nor does the order impair PGandE's freedom to hold its beliefs and act in accord with its corporate views. The commission's order does not create a possibility for confusion about the identity of the sponsors of the different messages that will appear in the billing envelope, thereby indirectly inhibiting PGandE's freedom to speak. The unambiguous disclaimer that the CPUC directed TURN to place on all its materials forecloses that risk. Nor does the commission's order, by making a PGandE billing a vehicle for distributing TURN's message, control or affect PGandE's editorial judgment with respect to the content of *Progress*. The order fosters, rather than discourages, the free discussion of public affairs. PGandE's simplistic reliance on dictionary definitions and on merely physical concepts of association trivializes, rather than vindicates, the commands of the First Amendment. Those standards are not contravened in this case.

ARGUMENT

I. Introduction

Appellant PGandE, supported by several utilities and others appearing *amici curiae*, advances an assortment of arguments to sustain its claim that the CPUC order allowing TURN to include materials four times a year in PGandE's billing envelope violates PGandE's freedom of speech. This

brief does not address the multitude of points and sub-points raised by PGandE and its supporters because this case can be resolved more simply. Utility accommodation of state-required consumer access to utility billing envelopes, under the circumstances presented here, does not abridge the utility's freedom of speech in either the communicative or the associational sense. This case can be resolved against PGandE at the analytical threshold.

II. The CPUC's order does not infringe upon PGandE's right to speak to its customers in the billing envelope and, therefore, does not implicate First Amendment values.

PGandE relies upon the fundamentally insupportable notion that the CPUC's order limits its ability to speak to its customers through its monthly billing envelope. The commission's order does not restrict the amount, subject matter, or content of the utility's speech.

PGandE wrongly asserts that the amount of its speech is limited notwithstanding that PGandE obviously remains wholly free to communicate with its customers through the billing envelope each month of the year, whether or not TURN's material is inserted in the envelope and regardless of the weight of TURN's inserts. The CPUC's order merely means that on those occasions when TURN's materials, together with *Progress* and the legally required billing and other notices, weigh over one ounce, PGandE would be required to pay for the cost of mailing *Progress* to its customers.

PGandE correctly concedes that the First Amendment does not entitle it to disseminate its message to its customers for free. Appellant's Brief at 39. *See U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 127 & n. 5 (1981). *Cf. Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545-46 (1983) (rejecting the proposition that First Amendment rights are not fully realized unless party's speech is subsidized by the state). The possibility that PGandE might lose its "free ride" in the billing envelope is not constitutionally objectionable; PGandE's ability to speak is not otherwise limited. Therefore, PGandE has shown no constitutionally cognizable restriction on its right to speak.

Nor does the commission's order affect the subject matter of PGandE's speech. PGandE's claim of communicational infringement at bottom rests on a distorted reading of this Court's decision in *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530 (1980). That decision does not support an argument that PGandE is entitled to monopolize the space in its billing envelope. In *Consolidated Edison*, the New York Public Service Commission had prohibited utilities from inserting in monthly billing envelopes materials discussing controversial issues of public policy. The Court observed:

> This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ." [citations omitted] In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question

> and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.

Consolidated Edison, 447 U.S. at 534-35. In contrast to *Consolidated Edison*, the CPUC's order here in no manner "limited the means by which [the utility] may participate in the public debate on . . . controversial issues of national interest and importance." *Id.* at 535. As already noted, the order leaves PGandE entirely free to communicate to its customers through its billing envelope as frequently as it desires, without regard to the subject matter or content of its messages. Unlike the New York commission's order in *Consolidated Edison*, therefore, the CPUC's order does not restrict PGandE's freedom to speak.

Further, PGandE erroneously contends that the commission's order strays from its "paramount obligation" to maintain government neutrality toward the content of protected communications. *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976). Appellant's Brief at 22. Appellant acknowledges that its contention concerning the CPUC's role in determining the content of the communications in the billing envelope flies in the face of the express language of the CPUC's order. *See* Appellant's Brief at 22-23. The order provides both that "PG&E and TURN shall each determine the content of its own material," and "All of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission." Motion to Dismiss of Appellee CPUC

(M.D.) at A-38, A-39. Plainly, the CPUC will exercise no content control over the messages in the billing envelope.

PGandE insists, however, that by granting TURN periodic access to the billing envelope, the CPUC has indirectly and unconstitutionally chosen the permissible content of the inserts by choosing the speaker. Appellant, and the utilities supporting appellant as *amici curiae*, assume that the views of TURN will be "hostile to the utilities' interests." Brief of *amici curiae* Pacific Northwest Bell *et al.* at 3. The assumption is blatantly premature. It also necessarily requires the conclusion that the utilities' interests are unremittingly hostile to those of their customers, an impression that utilities devote enormous amounts of resources annually to dispel. Further, PGandE's argument misconstrues the commission's goal "to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit [because] [i]t is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." M.D. at A-22. That statement does not, as PGandE would have it, "weigh the value of TURN's speech against PGandE's speech, or . . . make [a] . . . determination that TURN's messages would be a more efficient use of the envelope extra space." Appellant's Brief at 23. Rather, the CPUC has, without regard to the content of TURN's speech, which it will neither review, control, nor endorse, acted upon the fundamental assumption underlying the First Amendment that the airing of a variety of views,

rather than only one view, is the road to the eventual discovery of the truth:

> The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole. Under our Constitution "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., supra, 418 US, at 339-340, 41 L Ed 2d 789, 94 S Ct 2997 (footnote omitted).

Bose Corp. v. Consumers Union of U.S., Inc., ___ U.S. ___, 80 L Ed2d 502, 518 (1984). *See also Consolidated Edison*, 447 U.S. at 326.[2]

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[2] PGandE warns that by allowing TURN access to PGandE's billing envelopes, the CPUC has placed itself in the position of selecting and licensing speakers to use the billing envelope: A position rife with potential First Amendment problems. Appellant's Brief at 23-27. Appellant's claim is premature. First, the CPUC chose TURN, not from among competing applicants for the extra space in the billing envelope, but because TURN "is the only organization which has sought access to the PG&E billing envelope." M.D. at A-35. Thus, this case does not present the problem PGandE raises. If the problems foreseen by PGandE arise in the future, the CPUC may attempt to formulate a constitutionally neutral method for allocating space in the billing envelope. As the commission stated:

> Our action today should not be viewed as restricting access to TURN. The adoption of this proposal in no way precludes other proposals from being considered. Should other proposals be brought before us, we will consider the feasibility and benefits of each at that time. If we find that these proposals are meritorious, we could order that extra space be made available for the new program along with any previously authorized ones. Alternately, we could modify today's decision to provide for the implementation of a checkoff program as discussed above. This is consistent with the approach adopted in our UCAN decision.

M.D. at A-24. Finally, it seems plain that groups unsuccessfully seeking access to the billing envelope, not PGandE, would have standing to challenge such an order by the CPUC.

In sum, PGandE's argument proceeds from a basic distortion of the commission's order. That order does not, as appellant maintains, limit PGandE's speech or substitute TURN's speech for that of PGandE. The order merely places TURN's speech side by side with PGandE's speech. Appellant's stance reveals the essence of the problem here; PGandE, and the other utilities appearing as *amici curiae* in support of PGandE, do not explore the core of First Amendment values. Rather, they seek to be allowed to speak in the public marketplace of ideas, free from the competition of other messages. The CPUC's narrowly drawn order, not PGandE's position, embodies the principles at the heart of the First Amendment.

III. The CPUC's order does not abridge PGandE's rights to refrain from associating with the views of another or from disassociating itself from another's message.

PGandE relies on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), for the proposition that the CPUC's order unconstitutionally compels PGandE to speak and to associate with the speech of others. Those cases provide no support for appellant's argument.

Abood involved the constitutionality of a Michigan state law concerning union representation of local government employees. Under that law, through an agency-shop arrangement every employee represented by a union, whether or not a

union member, could be required to pay the union a service fee equal in amount to union dues. In *Abood*, this Court held that the First Amendment bars a state from requiring an individual to contribute financially to the support of an ideological cause he may oppose. *Abood*, 431 U.S. at 234. That holding was premised on the principle that the freedom of belief is "at the heart of the First Amendment." *Id.* This case bears no similarity to *Abood*. PGandE is not compelled in any fashion to contribute to the support of ideological causes it finds repugnant; the CPUC's order expressly requires TURN to reimburse PGandE "for all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials." M.D. at A-39. Moreover, even if a corporation may properly be said to hold "beliefs," PGandE's freedom of belief remains unimpaired by the CPUC's order.

The "association" with TURN's views that PGandE finds so objectionable is merely physical; at most four times each year PGandE's *Progress* may be required to share space with TURN's materials. That mere physical proximity is not the compelled "association" found to violate the First Amendment in *Abood*. There, it was the compulsion to contribute financial support to ideological causes one opposes, thereby preventing individual action based upon individual mind and conscience, that rendered the Michigan law infirm. *Abood*, 431 U.S. at 235. PGandE thus misapplies the rationale of *Abood* and thereby trivializes the First Amendment principles announced in that decision.

Further, physical sharing of the envelope does not imply PGandE's endorsement of TURN's views. The commission explained:

> [I]n order to protect against the possibility that one receiving a PG&E billing envelope would assume all its contents were generated by the utility, we will require that all of TURN's bill insert material clearly identify TURN as its source and state that their contents are not endorsed by PG&E.

M.D. at A-28. The commission's recognition of the efficacious use of disclaimers is supported by this Court's decision in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). In *Pruneyard*, this Court ruled that state constitutional provisions that permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited do not violate the owner's right to free speech under the First and Fourteenth Amendments. Addressing the possibility that the views expressed by members of the public passing out petitions on the owner's property could be identified with those of the owner, the Court stated:

> [A]s far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.

Pruneyard, 447 U.S. at 87. Hence, contrary to PGandE's assertion, it is not "highly likely that the public will receive a mistaken impression that the State's selection of TURN to

send its message in the billing envelope is supported by PGandE." Appellant's Brief at 19. PGandE's contention that a disclaimer as required by the CPUC would be ineffective, *id.*, is unfounded. This disclaimer also negates any potential for dilution of PGandE's message arising from the simultaneous presence of TURN's mailer. *See* Appellant's Brief at 13-14 n. 11.

Moreover, PGandE's argument that the disclaimer itself would be unconstitutional is meritless. That argument rests on PGandE's mistaken representation that the disclaimer "would force PGandE to speak even though it prefers to remain silent," (Appellant's Brief at 19), echoing Justice Powell's concerns expressed in *Pruneyard*, 447 U.S. at 99 (Powell, J., concurring). The CPUC's order to include a disclaimer was, however, directed at TURN, not at PGandE (M.D. at A-28, A-39); PGandE is not required to speak at all. In any event, appellant's misleadingly selective quotation of Justice Powell omits the premise for his concern: The likelihood that listeners will identify the views of the party granted access with the views of the one forced to grant access. *See Pruneyard*, 447 U.S. at 99 (Powell, J., concurring). As already explained, TURN's mandated disclaimer removes that potential for confusion. Further, *Pruneyard*'s sanction of a disclaimer by the owner of the shopping center to avoid confusion resolves the First Amendment issue against PGandE.

Justice Powell also cautioned that those granted access may "express views that are so objectionable as to require a response even when listeners will not mistake their

source," *Pruneyard*, 447 U.S. at 101 (Powell, J., concurring), thereby burdening "the right to control one's own speech." *Id.* at 100. PGandE does not allege, however, that TURN will express views so repugnant to its own as to require an answer even when its customers will not confuse their source. Consequently, here as in *Pruneyard* the facts do not raise the issue that troubled Justice Powell.

Nor is *Wooley v. Maynard* helpful. There, the Court ruled that the State of New Hampshire could not constitutionally require an individual to display its state motto, "Live Free or Die," on an automobile license plate. The law at issue there was abhorrent to the First Amendment because it

> force[d] an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the state "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Wooley v. Maynard, 430 U.S. at 715, *quoting from Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Again, and contrary to PGandE's contention, the CPUC's order does not force PGandE to advocate or foster public adherence to a point of view it finds objectionable, and does not invade PGandE's "sphere of intellect and spirit," *Wooley v. Maynard*, 430 U.S. at 715. PGandE remains at liberty to hold and advocate whatever views it chooses, and to disassociate itself, financially and intellectually, from views it finds distasteful.

Finally, nothing in *Miami Herald Publishing Co. v. Tornillo* aids appellant. This Court's decision there invalidated on First Amendment free press grounds a Florida law that

required newspapers to publish the replies of political candidates whom they had criticized. That law violated the First Amendment because it intruded into the "exercise of editorial control and judgment." *Tornillo*, 418 U.S. at 258. In so doing, the statute threatened to stifle editorial comment by encouraging newspaper editors to steer the safe course and avoid controversy. That threat struck at a major purpose of the First Amendment: To "protect the free discussion of governmental affairs." *Id.* at 257, *quoting from Mills v. Alabama*, 384 U.S. 214, 218 (1966).

PGandE's reliance on *Tornillo* rests on its simplistic, mechanistic application of a dictionary definition of the term "publish." *See* Appellant's Brief at 16 n. 13. Appellant thus misses the meaning of *Tornillo*. That case did not involve the newspaper as "a passive receptacle or conduit" for the dissemination of written matter, *Tornillo*, 418 U.S. at 258, as PGandE is under the CPUC's order. Rather, this Court stressed:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.

Id. The commission's challenged decision here does not purport to control or affect PGandE's "editorial control and judgment" over the content of *Progress*. Nor, plainly, will the inclusion of TURN's material in the utility's billing envelopes frighten PGandE into silence, thereby limiting debate on

issues of public importance; PGandE does not contend otherwise. Instead, the commission's order will foster the "First Amendment's role 'in affording the public access to discussion, debate, and the dissemination of information and ideas.'" *Consolidated Edison*, 447 U.S. at 541, *quoting from First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

CONCLUSION

Neither Oregon's voter-initiated Citizens' Utility Board legislation, nor CPUC's order requiring PGandE to allow a consumer group limited access to its billing envelopes, abridges a public utility's freedom of speech. The order appealed from should be affirmed.

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